ORDER OF THE PRESIDENT OF THE COURT
OF 26 FEBRUARY 1981 [1]

Arbed SA and Others
v Commission of the European Communities

"System of production quotas for steel, Arbed"

Case 20/81 R

In Case 20/81 R

1. ARBED SA, whose registered office is in Luxembourg,

2. STAHLWERKE RÖCHLING-BURBACH GMBH, whose registered office is in Völklingen (Federal Republic of Germany),

3. NEUNKIRCHER EISENWERK AKTIENGESELLSCHAFT, VORMALS GEBRÜDER STUMM, whose registered office is in Neunkirchen (Federal Republic of Germany),

represented by Arved Deringer and Jochim Sedemund of the Cologne Bar, with an address for service in Luxembourg at the office of Georges Faber, Arbed SA, Avenue de la Liberté,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by H. Matthies, Legal Adviser, assisted by E. Grabitz, Professor at the Free University of Berlin, with an address for service in Luxembourg at the office of O. Montalto, a member of the Legal Department, Jean Monnet Building, Kirchberg,

defendant,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

1 — Language of the Case: German.

ORDER

Facts and Issues

I — The background to the dispute

1. By general Decision 2794/80/ECSC of 31 October 1980 (Official Journal 1980, L 291, p. 1), the Commission instituted a system of production quotas for steel for the undertakings in the steel industry.

2. According to Article 2 of that decision, the Commission is to fix quarterly production quotas for crude steel and for the four groups of rolled products defined in that article and, in greater detail, in Annex I to the decision.

3. According to Article 3 of the general decision, the Commission is to fix quarterly production quotas "for each undertaking" on the basis of the reference production figures as referred to in Article 4 of that undertaking and by application of abatement rates to these reference production figures as referred to in Article 5. However, Article 1 (3) of the decision states that, for the purpose of applying the decision, that is to say, as regards both the calculation of the reference production figures and the establishment of the production quotas resulting from these, any group of concentrated undertakings within the meaning of Article 66 of the ECSC Treaty is to rank as a single undertaking, even if these undertakings are located in different Member States.

4. Subparagraphs (1) and (2) of Article 4 of the decision lay down the general rules for the establishment of the quarterly reference production figures both for rolled products and for crude steel. They 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."

5. Subparagraphs (3), (4) and (5) of Article 4 describe special cases in which the production reference figures and, consequently, the quotas are to be increased. According to Article 4 (3), the Commission is to increase, in conformity with certain specified criteria, the production reference figures for undertakings which during the period from July 1977 to July 1980 had an average rate of utilization of production facilities 10 percentage points or more below the average rate of utilization of the other undertakings of the Community during the years 1977, 1978 and 1979.

Article 4 (5) provides that, to take account of restructuring, the Commission is to increase the reference production figures:

"— Where an undertaking's total production of the four groups of products during a reference period falls short of production in the same quarter of 1974, and

— Where this undertaking has achieved for the year ending in 1979 a profit which is shown in its annual report or reported to the national official agency responsible for the filing of the annual accounts of companies.

In this case, the Commission shall increase the reference production figures so as to reach the total equivalent to the production of the corresponding quarter of 1974".

The applicant Röchling relies on subparagraph (3). The applicants Arbed and Neunkircher Eisenwerk rely on subparagraph (5).

6. The rate of abatement in relation to the production reference figures for the groups of rolled products is to be fixed, in implementation of Article 5 (1) of general Decision 2794/80/ECSC, as amended by Article 1 of Commission Decision 3381/80/ECSC of 23 December 1980 (Official Journal 1980, L 335, p. 37), as follows:

Rolled products		
Group I	Hot-rolled wide and narrow strip	27·73%
Group II	Reversing mill plate and wide flats	22·76%
Group III	Heavy sections (sheet-piling, wide-flanged beams, other beams and other sections, permanent way material)	19·59%
Group IV	Light sections (corded wire rod, concrete reinforcing bars and other merchant bars)	27·64%
Crude steel		26·18%

7. According to Article 14 of the decision, where the production or delivery restrictions imposed by the decision or its implementing measures entail exceptional difficulties for an undertaking, it may refer the matter to the Commission. The Commission is to examine the case without delay, in the light of the objectives of the decision. After examination, the Commission is to adapt, where appropriate, the provisions of the decision. Lastly, Article 9 provides for fines on undertakings exceeding their production quotas.

8. By individual decision of 19 December 1980, confirmed by telex message of 30 December 1980, the Commission fixed the production quotas for the whole of the Arbed group for the period from 1 January 1981 to 31 March 1981 as follows:

	Reference				Reduction	Quota first quarter 1981
	January 1980	February 1980	March 1980	Total		
	tonnes	tonnes	tonnes	tonnes	%	tonnes
Rolled products						
Group I	328 715	312 946	333 405	975 066	27·73	704 680
Group II	2 917	6 473	2 647	12 037	22·76	9 297
Group III	146 944	135 038	157 241	439 223	19·59	353 179
Group IV	312 100	332 737	328 373	973 210	27·64	704 215
Total I—IV	790 676	787 194	821 666	2 399 536		1 771 371
Crude steel	1 040 659	966 951	1 076 484	3 084 094	26·18	2 276 678

II — The written procedure

1. By application, registered at the Court on 4 February 1981, the *applicants* brought an action for a declaration that the decisions of 19 December 1980, or failing that, those of 30 December 1980, fixing the production quotas allocated to them for the first quarter of 1981 are void in part. They say that these decisions infringe various provisions of the ECSC Treaty, Article 4 (3) and (5) and Article 14 of Decision 2794/80/ECSC, and also the principle of non-discrimination inasmuch as:

(a) the calculation of the reference production figures and of the production quotas is based on a concept of an undertaking which is incorrect and incompatible with Articles 4 (b), 58 (2) and 80 of the ECSC Treaty;

(b) as a result of this incorrect concept of an undertaking the applicants Arbed and Neunkircher Eisenwerk are unable to rely on the increases in the production quotas provided for in Article 4 (5), the benefit of which they could claim if their production reference figures and their quotas had been fixed individually;

(c) for the same reason the applicant Röchling-Burbach is deprived of the benefit of the increases in quotas which result from Article 4 (3) and which it, too, could claim individually both for rolled products and for crude steel;

(d) the Commission failed to take account, in issuing the contested decision, of the difficulties resulting for the applicants from the above-cited provisions of the general decision, when Article 14 of that decision requires it to do so.

2. A correct calculation would lead to the production reference figures and, consequently, the production quotas for

the first quarter of 1981, being increased by the following quantities:

Under (a) By virtue of the application of Article 4 (1), the sum of the production quotas for the undertakings in the group would exceed by 54 252 tonnes the quotas allocated to the group as a whole.

Under (b) By virtue of the application of Article 4 (5), the quotas of the applicant Arbed would have to be increased by 210 972 tonnes and those of the applicant Neunkircher Eisenwerk by 34 470 tonnes.

Under (c) By virtue of the application of Article 4 (3) the quotas of the applicant Röchling-Burbach should be increased by 163 583 tonnes of crude steel and by 131 684 tonnes of rolled products.

3. On 4 February 1981, the applicants made an application, pursuant to Article 39 of the ECSC Treaty and Article 83 of the Rules of Procedure of the Court, for the adoption of interim measures. The object of that application is to "compel the defendant" to grant a general increase, to the extent of two-thirds of the quantities stated in their main application, in "the reference production figures and, consequently, in the applicants' production quotas for the first quarter of 1981".

4. In its observations on the request for emergency measures, the *Commission* contends that the Court should

Dismiss the request for an order for the grant of interim relief.

III — Submissions and arguments of the parties

A — Observations of the applicants

The *applicants* consider that it is impossible to see how a judgment on the application in the main action could be delivered before the end of the first quarter of 1981 and, possibly, even before the end of the second quarter of 1981, for which reference production figures and production quotas have respectively to be communicated and fixed afresh. In these circumstances they are faced with the alternative of abiding by the quotas fixed which, in their view, are unlawful, or of exceeding them, with the result that the Commission would, in conformity with Article 9 of the general decision, impose heavy fines on them.

If the applicants comply with the fixed production quotas, their production would be about 20% less than that to which they would be entitled if the quota system were applied in conformity with the Treaty. This would have serious economic, financial and social consequences.

From the economic point of view, this reduction would cause a further substantial deterioration in the results of the undertaking, since the particularly high fixed costs of the operations of this industry would be supported by an even smaller production.

As regards the social consequences, the Röchling-Burbach steelworks and the Neunkircher Eisenwerk AG would have to pass from already very considerable partial unemployment to massive dismissals. Furthermore, the resultant social difficulties could no longer be met by social measures, as is the case in the context of reorganization programmes, since the necessary financial means for that purpose would not be available.

If, on the other hand, the applicants were to choose to exceed the production quotas to a limited extent in order to avoid these grave social consequences, the financial charges then to be reckoned with as a result of the heavy fines would

be just as serious. Even if the Court were subsequently, in the main proceedings, to rule in whole or in part in favour of the applicants, it would be impossible to make up for the present lack of production. What could not be produced during the first quarter of 1981 would be lost once and for all to the applicants.

From another point of view, the Community's interest in a strict compliance with the production quotas is not sufficiently great to constitute an obstacle to a limited increase for the first quarter of 1981. Article 14 of the general decision provides that the Commission may, where appropriate, adapt the provisions of that decision when the measures for their implementation entail exceptional difficulties for an undertaking. Recourse to Article 14 has repeatedly been invoked by the two parties in this context, but until now the Commission has been unable to decide to apply it. In that respect not only is there a mistaken assessment, since the Commission has failed to exercise, as it is required to do, the discretion vested in it under the terms of Article 14, but also a failure to act, which makes an interim measure necessary in order to avoid irreparable damage to the applicants. Such an interium measure can in any event take account of the criteria laid down by Article 14 to an extent which would enable the applicants to overcome the greatest transitional difficulties.

B — Observations of the defendant

The *Commission* states that it is aware of the difficulties experienced by numerous steelworks, and that it understands that the undertakings should use all the means at their disposal to have the quotas fixed at a higher level. These considerations lead it to apply the quota system with the greatest care by keeping permanently in contact with those concerned. However, the requests for increases in production quotas which were submitted by the applicants at the end of 1980 had, after examination, to be rejected as unfounded. It may also be noted that the applicants did not bring an action against the fixing of the group quotas for the fourth quarter of 1980 and the Commission is surprised that, in respect of the first quarter of 1981, they should contest a method which they accepted in respect of the last quarter of 1980.

For a request for the adoption of interim measures to be successful, the applicants must prove that the measures requested:

(a) shall be without prejudice to the decision to be given on the substance of the case;

(b) are *prima facie* justified in fact and in law;

(c) are urgent, that is to say, necessary in order to prevent irreparable damage from being caused.

As to (a) The measures requested prejudge the decision to be given on the substance of the case.

It is apparent from the request for the adoption of interim measures that the measures requested prejudge the decision to be given on the substance of the case. It seeks in effect, by means of an emergency procedure, to produce a result whereby the main application would succeed to the extent of two-thirds of the claim. An interim measure of this kind is in fact a definitive measure: if unrealized production cannot be made up, it is *a fortiori* precluded that production achieved can be annulled. Nor, on the other hand, is it possible to contemplate making the measure subject to the provision of a security, since the

applicants are of the view that the financial burdens would be just as heavy.

As to (b) The measures requested are not *prima facie* justified in fact or in law.

Article 1 (3) of the general decision does not define the concept of an undertaking, but confines itself to designating those subject to the system in question. This reference to groups of undertakings does not entail any discrimination. On the contrary, the application of different treatment to economically comparable units on the ground of differences in their legal status would be discriminatory. After all, the Arbed group itself relied on Article 1 (3) and asked for increases in the quotas for the products coming under Group III and for crude steel. These increases were granted to it for the fourth quarter of 1980.

As regards the calculations of the reference production figures and the production quotas claimed by the applicants, the Commission observes that it is not yet in a position to check the figures given or their basis of calculation. However, the size of such increases can only be described as puzzling. If the other groups of undertakings and undertakings with several factories put forward the same claims the whole quota system would collapse. It must not be forgotten that this system is based on a fair distribution of estimated needs and that as a result increases granted to one undertaking mean corresponding reductions for all the undertakings.

Lastly, the purpose of Article 14 of the general decision is not to grant special advantages to certain undertakings but, on the contrary, to mitigate excessive sacrifices which the application of the general decision would entail for certain undertakings, but without placing in jeopardy the attainment of the objectives of the quota system.

As to (c) The measures are not urgent.

According to the Commission, the applicants have not proved that the measures requested are necessary in order to prevent irreparable damage. When they maintain that the quotas fixed have the effect of directly threatening the employment of between 2 500 and 3 000 workers, they should provide additional evidence, namely, first, that the increased production quotas can be fully used and, secondly, that the whole of the increased production can be disposed of.

The purpose of all the Commission's efforts is precisely to avoid further dismissals and additional financial burdens. But the Commission does not think that the allocation of higher quotas to certain undertakings is an appropriate method of achieving these aims. The quota system is based on a distribution, between all the undertakings, limited to a certain period of time, of production capable of being disposed of.

Lastly, the Commission states that in order not to imperil the supplies of certain traditional buyers of special products, the reference production figures, and, as a result, the quotas of the Arbed group, were increased for the fourth quarter of 1980 respectively by 34 000 tonnes for crude steel and 27 200 tonnes for the rolled products under Group III. The Commission will shortly decide on comparable requests submitted by the Arbed group for the first quarter of 1981.

IV — Oral procedure

The parties were duly summoned and presented oral argument at the hearing on 19 February 1981.

Decision

1 Article 39 of the Treaty establishing the European Coal and Steel Community provides that actions brought before the Court do not have suspensory effect. However, the Court may, if it considers that circumstances so require, order that application of the contested decision be suspended. It may also prescribe any other necessary interim measures.

2 Under Article 83 (2) of the Rules of Procedure of the Court, the grant of an application to suspend the operation of a measure and a decision ordering interim measures are subject to the existence of circumstances giving rise to urgency and grounds establishing a *prima facie* case for such measures.

3 By general Decision 2794/80/ECSC of 31 October 1980 (Official Journal 1980, L 291, p. 1), a system of production quotas for steel was established for the undertakings in the steel industry. According to Article 2 (1) of that decision, the Commission is to fix quarterly production quotas for crude steel and for four groups of rolled products.

4 According to Article 3, the Commission is to fix these quotas for each undertaking "on the basis of the reference production figures, as referred to in Article 4, of that undertaking" and "by application of abatement rates to these reference production figures as referred to in Article 5". However, Article 1 (3) of the decision provides that, as regards the fixing both of the reference production figures and of the production quotas resulting from them "any group of concentrated undertakings within the meaning of Article 66 of the Treaty shall rank as a single undertaking, even if these undertakings are located in different Member States".

5 The Commission took the view that the undertakings Arbed SA, Luxembourg, Métallurgique et Minière de Rodange-Athus SA, Rodange, Sidmar, Ghent (Belgium), Stahlwerke Röchling-Burbach GmbH, Völklingen, Neunkircher Eisenwerk AG, Neunkirchen, Lech-Stahlwerke GmbH, Meitingen-Herbertshofen, Eischweiler Bergwerksverein-Hüttenbetriebe, Eschweiler/Aue, and Trefil-Arbed Drahtwerk Köln GmbH, Cologne (Federal Republic

of Germany), constitute a group for the purposes of the above-mentioned Article 66 and, by decision of 19 December 1980, it fixed the production quotas for the totality of the undertakings of this group as follows:

Quota first quarter 1981 — in tonnes	
Rolled products	
Group I	704 680
Group II	9 297
Group III	353 179
Group IV	704 215
Total I—IV	1 771 371
Crude steel	2 276 678

6 By application, registered at the Court on 4 February 1981, three undertakings of the group, namely, Arbed SA, Röchling-Burbach and Neunkircher Eisenwerk, instituted proceedings under Article 33 of the ECSC Treaty essentially for a declaration that the individual decision of 19 December 1980 is void to the extent to which the reference production figures and the production quotas communicated for the first quarter of 1981 are not fixed at a higher rate.

7 These proceedings are essentially founded on the assertion that Article 1 (3) of the general decision infringes Articles 4 (b), 58 (2) and 80 of the ECSC Treaty in that, for the purposes of the application of the quota system, it ranks a group of undertakings as a single undertaking. For the purposes of calculating the reference production figures and the production quotas resulting from them, the Commission unlawfully aggregated the reference production figures of the various undertakings of the group. The only method in conformity with the Treaty would be to fix these reference production figures and production quotas for each individual undertaking in turn.

8 The applicants also contend that if this method of calculation by reference to each individual undertaking in turn had been adopted, the result would have been, first, that the sum of the reference production figures of the undertakings of the group would have exceeded by 54 252 tonnes per quarter those allocated to the group as a whole and that, as a result, the sum of the production quotas of those same undertakings would have exceeded by 39 245 tonnes the production quotas allocated to the group for the first quarter of 1981.

9 A further result would have been that the applicants Arbed and Neunkircher Eisenwerk would be in a position to rely on Article 4 (5) of the general decision which, in the event of the restructuring of an undertaking, allows the quotas to be increased. As regards rolled products, such an increase would amount, for the first quarter of 1981, to more than 210 000 tonnes for Arbed and about 34 000 tonnes for Neunkircher Eisenwerk.

10 Finally, the result would have been that the applicant Röchling-Burbach GmbH could rely on Article 4 (3) which, too, allows the quotas to be increased beyond what would result from the application of Article 4 (1) alone. This increase would amount, for the first quarter of 1981, to about 131 000 tonnes for rolled products and about 163 000 tonnes for crude steel.

11 The interlocutory application seeks, by way of interim relief, an order requiring the Commission to increase the production quotas by two-thirds of the increases claimed in the application in the main action.

12 It is common ground between the parties that the three applicants form part of a group of concentrated undertakings within the meaning of Article 66 of the Treaty. It follows that, having regard to the rule laid down in Article 1 (3) of general Decision 2794/80/ECSC, the Commission did not exercise a discretion in this matter but applied in automatic fashion the criteria established in a precise and detailed manner by Articles 3, 4 and 5 of the general decision. The purpose of the application is thus to obtain from the judge responsible for granting interium relief an individual dispensation from the terms of general Decision 2794/80/ECSC by substituting, in favour of the undertakings concerned, criteria for fixing the quotas different from those applicable to all those steel undertakings which, like the applicants, form part of a group within the meaning of Article 1 (3) of the general decision. This request for a derogation is based on the idea that Article 1 (3), which constitutes the legal basis of the individual decision contested in the main action, is itself unlawful.

13 By virtue of Article 39 of the ECSC Treaty and Article 83 of the Rules of Procedure, as well as of a consistent line of decisions of the Court, measures of this kind may be adopted by the judge hearing the application for such

measures if it is established that their adoption is *prima facie* justified in fact and in law, if they are urgent in the sense that it is necessary, in ordet to avoid serious and irreparable damage, that they should be laid down, and should take effect, before the decision of the Court on the substance of the action and if they are provisional in the sense that they do not prejudge the decision on the substance of the case, that is to say that they do not at this stage decide disputed points of law or of fact or neutralize in advance the consequences of the decision to be given subsequently on the substance of the action.

14 As regards the existence of serious and irreparable damage, it has become apparent that even if the applicants' point of view regarding the application of Article 4 (1) of the general decision were upheld, the reference production figures and the production quotas resulting from them would only be increased, in respect of all the undertakings in the group to which the applicants belong, by 54 252 tonnes and 39 245 tonnes respectively for the first quarter of 1981. It has even been stated, in a later communication from the applicants, that the increase so far as they are concerned would only be 2 260 tonnes. A difference of this magnitude, spread over three months, cannot be regarded as being such as to cause serious and irreparable damage to undertakings of the size of the applicants.

15 As regards the argument put forward by the applicants Arbed and Neunkircher Eisenwerk, and based on the premise that a refusal to consider them as separate undertakings deprives them of the benefit of the application of Article 4 (5), it must be stated that these two applicants have not succeeded in establishing a *prima facie* case, in fact and in law, for the measure applied for.

16 The Commission expressly denies that, even taken individually, these undertakings may rely on the said paragraph (5).

17 Furthermore, according to the wording of that provision, its application depends on two concurrent conditions, that is to say, that the total production in respect of the four groups of rolled products during a reference period falls short of production in the same quarter of 1974 and, secondly, that this undertaking has achieved for the year ending in 1979 "a profit which is shown in its annual report or reported to the national official agency responsible for the filing of the annual accounts of companies".

18 The answer to the question whether the applicants meet, in particular, the second of these conditions is so much the subject of controversy that the premise necessary for the grant of an interim measure, namely that this condition may be considered as *prima facie* fulfilled, in law and in fact, is wholly lacking.

19 The same applies as regards the applicant Röchling-Burbach's argument that the refusal to consider it as an individual undertaking deprives it of the benefit of Article 4 (3) of the general decision. The application of the special system provided for by Article 4 (3) depends on the finding by the Commission that "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".

20 The Commission expressly denies that, even considered individually, this applicant meets the conditions which would enable it to claim the benefit of that provision. According to the Commission, the average rate of utilization of the production capacity of Röchling-Burbach is not, as regards rolled products, 10 percentage points below the average rate of utilization referred to in the said paragraph (3), which rules out the application of that provision. The applicant on the other hand makes the point that its production of crude steel is at a level which, according to it, makes it possible to call for an increase in quotas both for crude steel and for rolled products, even if, as regards the latter, the level of minus 10 points were not reached.

21 The dispute between the parties on the interpretation to be given to Article 4 (3) bears upon the essential features of that provision. In these circumstances, it cannot be found that the applicant has succeeded in establishing a *prima facie* case, in law and in fact, for the partial application of paragraph (3), which it seeks by way of interim relief.

22 The applicants have relied on the financial consequences and the consequences from the point of view of employment which, according to them, would result from the inadequate quotas allocated to them. In this respect, however, they have merely provided general indications which do not warrant the conclusion that the sacrifices and disadvantages which they would incur would be of a different order of magnitude from the sacrifices and disadvantages which are the inevitable result of the implementation of a quota system for the steel undertakings as a whole and in particular for the numerous other groups of undertakings to which Article 1 (3) has been applied.

23 For the reasons given above the measures applied for cannot be granted.

24 None the less, it cannot pass unnoticed that, in a case such as the present one, involving economic measures which produce particularly severe effects but which are spread over successive periods of short duration, there is a risk that the decision to be given on the application in the main action may not, because of the passage of time, enable full justice to be done. Although this consideration is not enough to justify, at the stage of the procedure for the adoption of interim measures, the grant of measures which go beyond the context within which that procedure is to be applied, it is, however, proper to invite the parties to consider together whether recourse to the possibilities offered by Article 41 (1) of the Rules of Procedure of the Court for expediting the written procedure may, so far as is possible, mitigate that risk.

Costs

25 It is appropriate, at this stage, to reserve the costs.

On those grounds,

THE PRESIDENT OF THE COURT,

by way of interlocutory decision,

hereby orders as follows:

1. **The applications are refused.**

2. **The costs are reserved.**

3. **The parties are requested to consider together the possibility of resorting to an abridged written procedure with a view to expediting the proceedings in the main action.**

Luxembourg, 26 February 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President