JUDGMENT OF THE COURT (FIFTH CHAMBER)
27 NOVEMBER 1984 [1]

Srl Bensider and Others v Commission of the European Communities

(Steel — Production certificate and accompanying document)

Case 50/84

1. *Application to have a measure declared void — Action by a company in formation against an ECSC general decision — Capacity to bring an action — Conditions — Legal personality — Assessment thereof under national law*
   (ECSC Treaty, Art. 33, second para.)

2. *Procedure — Admissibility of actions — Assessment by reference to the situation prevailing when the application is lodged — Rectification — Conditions*

1. In order to be able to institute proceedings against a general decision, acting as an undertaking pursuant to the second paragraph of Article 33 of the ECSC Treaty, a company in formation must have acquired legal personality and fulfilment of that condition must necessarily be established in accordance with national law.

2. The admissibility of an action must be judged by reference to the situation prevailling when the application is lodged. If at that time the conditions for an action to be brought are not fulfilled, the action is inadmissible, unless the defect is rectified within the period prescribed for proceedings to be instituted.

In Case 50/84

SRL BENSIDER, Roveredo in Piano (Italy),
SA SIPROTOLE, Neupre (Belgium),

1 — Language of the Case: French.

SA VIELLEVOYE-INTERTOL, Alleur (Belgium),

SPRL HAIDON ET HUBIN, Tihange-lez-Huy (Belgium),

JEAN MORSA, Embourg-Chaudfontaine (Belgium),

SOCIÉTÉ COOPÉRATIVE DY METAL, Brussels,

SA CHARLEMETAL, Brussels,

represented by R. Swennen, of th Liège Bar, with an address for service in Luxembourg at the Chambers of J. Wagener, 10 A Boulevard de la Foire,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, E. Lasnet, acting as Agent, with an address for service in Luxembourg at the office of M. Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

concerning, at this stage in the procedure, the admissibility of the action brought by the applicants under the second paragraph of Article 33 of the ECSC Treaty,

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, 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 — Facts and written procedure

1. By application lodged at the Court Registry on 25 February 1984, six Belgian undertakings and an Italian undertaking (Srl Bensider), which are all steel dealers, applied for a declaration that Commission Decision No 3717/83/ECSC of 23 December 1983 introducing for steel undertakings and steel dealers a production certificate and an accompanying document for deliveries of certain products (Official Journal 1983, L 373, p. 9) was void. That decision appeared in the Official Journal of 31 December 1983.

2. By application lodged at the Court on 8 March 1984, the applicants also sought suspension of the operation of the contested decision. By order of 23 May 1984, the President of the Court dismissed that application.

3. Srl Bensider was constituted by notarial act on 9 February 1984, but was not entered in the commercial register of the Tribunale di Pordenone until 13 March 1984. At its general meeting of 4 April 1984, the company approved "all steps taken by the sole director before the date of approval and entry in the commercial register of the Tribunale di Pordenone [District Court, Pordenone], including in particular the company's decision to bring an action before the Court of Justice in Luxembourg by an application submitted on 25 February 1984 for a declaration that Decision No 3717/83/ECSC was void ... and to assume responsibility for all obligations arising from the documents signed by the sole director, ratifying and confirming the same in their entirety".

4. By application of 27 March 1984, pursuant to Article 91 of the Rules of Procedure of the Court, the Commission lodged an objection of inadmissibility. The objection is based, as regards the six Belgian undertakings, on the submission that the action was brought out of time and, in the case of Srl Bensider, on the alleged lack of capacity of that undertaking to be a party to legal proceedings at the time in question. The Commission claims that the Court should:

Declare the application inadmissible;

Order the applicants to pay the costs.

5. The applicants, and in particular Bensider, submitted their observations on the objection of inadmissibility on 4 May 1984. In their submissions in reply, the applicants claim that the Court should:

Declare their application to be admissible;

Request the Commission to submit observations on the substance of the case.

6. By order of 20 June 1984, the Court assigned the case to the Fifth Chamber for consideration of the admissibility of the application.

7. Upon hearing the report of the Judge Rapporteur and the views of the Advocate General the Court decided to open the oral procedure on the objection of inadmissibility without any preparatory inquiry.

II — Submissions and arguments of the parties as to the admissibility of the action

1. The *Commission* considers that the action brought by the six applicants who are resident in Belgium is inadmissible since the application was lodged out of time.

2. The period within which proceedings must be instituted, pursuant to the third paragraph of Article 33 of the ECSC Treaty in conjunction with Articles 80 and 81 of the Rules of Procedure of the Court and Article 1 of Annex II thereto, expired in this case, as far as the six Belgian applicants are concerned, on 17 February 1984.

3. The Commission points out that in its decisions the Court has emphasized that the period within which proceedings may be initiated must be strictly observed. In that connection it refers to the judgment delivered on 9 February 1984 in Case 284/82, *Acciaierie e Ferriere Busseni SpA* v *Commission*, [1984] ECR 557. It therefore considers that, as regards those six applicants, the action is inadmissible.

4. As regards Srl Bensider, the Commission considers that although the action was not brought out of time, since the application was lodged within the period prescribed in Article 33 of the ECSC Treaty, as extended on account of distance by virtue of Article 1 of Annex II to the Rules of Procedure, the action is also inadmissible in that case. When the application was lodged, namely on 25 February 1984 (which was also the last day of the prescribed period), Srl Bensider was not yet entered in the commercial register, and therefore on that date it had not acquired legal personality under Italian law, which is applicable to this case. Consequently it was not entitled on that date to be a party to legal proceedings. That is the effect of the provisions of the Italian Civil Code and in particular of Articles 2331 and 2475 which expressly provide that a company acquires legal personality only by being entered in the commercial register.

5. The *applicants* are of the opinion that, as far as the six Belgian undertakings are concerned, the action was not brought out of time. They point out that the action was brought by undertakings whose object in all cases is the marketing of second steel products. Thus, the applicants are justified in instituting proceedings by means of a single application because their common rights of action are connected and are even indivisible. In those circumstances it is proper to apply to all the applicants the longest extension on account of distance, namely that which applies in the case of Bensider.

6. Moreover, the applicants consider the allegation that Bensider did not exist on 25 February 1984 to be incorrect. It is apparent from the documents submitted

to the Court that the company was constituted by notarial act on 9 February 1984. In order to acquire legal personality the company had to be entered in the commercial register. That was done immediately. It was merely because of the formalities inherent in registration of that kind that the company was not actually registered until 13 March.

7. In accordance with the usual practice in Italy, on 4 April 1984 the steps taken by the sole director of the company before it was entered in the commercial register were approved and ratified at a general meeting. That ratification is retroactive. The applicants therefore maintain that, as from 9 February 1984, the date of the instrument constituting the company, the company could validly be a party to legal proceedings.

8. In the second place, it is to be noted that the Commission seeks to rely before the Court of Justice upon rule of Italian municipal law which does not appear either in the ECSC Treaty or in the Rules of Procedure of the Court. The requirement of prior registration in a commercial register before a company may be a party to legal proceedings exists in the law of various States, particularly in Belgian law, but the consequences attaching to that formality vary from one legal system to another (annulment, subsequent ratification and so forth). A provision might have been included in the Rules of Procedure of the Court adopting one system rather than another, but in fact there is no provision of that kind. It must therefore be concluded that the rule upon which the Commission seeks to rely is enforceable only before Italian courts and cannot be validly relied upon before the Court of Justice of the European Communities.

9. That position is further confirmed by the fact that the contested decision is likely adversely to affect Srl Bensider, since it specializes in the marketing of second steel products.

III — Oral procedure

Oral argument was presented by the applicants, represented by R. Swennen, and the Commission, represented by E. Lasnet, at the sitting on 25 September 1984.

The Advocate General delivered his opinion at the sitting on 23 October 1984.

Decision

1 By application lodged at the Court Registry on 25 February 1984, Srl Bensider, whose registered office is at Roveredo in Piano, Italy, and six other applicants resident in Belgium, namely SA Siprotole, SA Viellevoye-Intertol, Sprl Haidon et Hubin, Jean Morsa, Société Coopérative Dy Metal and SA Charlemetal, brought an action under the second paragraph of Article 33 of the ECSC Treaty for a declaration that Commission Decision No 3717/83/ECC of 23 December 1983 introducing for steel undertakings

and steel dealers a production certificate and an accompanying document for delivery of certain products (Official Journal 1983, L 373, p. 9) was void.

2 The Commission objected that the action was inadmissible and asked the Court to give a decision on that objection without considering the substance of the case. The Court referred the case to the Fifth Chamber for consideration of the admissibility of the action.

3 As regards the six applicants resident in Belgium, the Commission maintains that the period laid down in the third paragraph of Article 33 of the ECSC Treaty within which proceedings are to be instituted expired on 17 February 1984. As regards those applicants, therefore, the action is inadmissible as having been brought out of time.

4 Although Srl Bensider's action was brought on the last day of the prescribed period, which included the extension on account of distance granted to parties resident within the territory of the Italian Republic by virtue of Annex II to the Rules of Procedure, that action is, in the Commission's view, also inadmissible because on that date the company has not been entered in the commercial register. Under Italian law it had therefore not acquired legal personality and was not entitled to be a party to legal proceedings.

5 The applicants do not dispute the correctness of those arguments. They claim however that Srl Bensider was entered in the commercial register on 13 March 1984 and that, in accordance with normal practice in Italy, the steps taken by the sole director of the company before it was thus registered were approved an ratified at a subsequent annual general meeting held on 4 April 1984. That ratifications was retroactive. Moreover, the Commission may not, in their view, validly have recourse to an internal rule of Italian law in order to prevent an action before the Court of Justice.

6 The applicants contend that, since the action is admissible as far as Srl Bensider in concerned, the same applies to the other applicants. All the applicants are engaged exclusively in the marketing of second steel products and they are therefore entitled to institute proceedings by means of a single application since their common rights of action are connected and are even indivisible.

7 Under the second paragraph of Article 33 of the ECSC Treaty undertakings may institute proceedings for a declaration that general decisions which they consider to involve a misuse of powers affecting them are void. If the undertaking is a company in formation, that company must, in order to institute proceedings, have acquired legal personality, and that fact must necessarily be established in accordance with national law.

8 The admissibility of an action must be judged by reference to the situation prevailing when the application is lodged. If at that time the conditions for an action to be brought are not fulfilled, the action is inadmissible, unless the defect is rectified within the period prescribed for proceedings to be instituted.

9 The parties agree that when the application was lodged, on the last day of the prescribed period, Bensider had not yet acquired legal personality under its national law. It follows that in this case the action is inadmissible.

10 As regards the six Belgian applicants, it need only be stated that the application was lodged after the expiry of the period prescribed for proceedings to be instituted by undertakings resident within the territory of the Kingdom of Belgium.

11 The application must therefore be dismissed as inadmissible in its entirety.

Costs

12 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their submissions, they must be ordered to bear the costs jointly and severally.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicants to bear the costs jointly and severally.**

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 27 November 1984.

For the Registrar

H. A. Rühl

Principal Administrator

O. Due

President of the Fifth Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 23 OCTOBER 1984 [1]

Mr President,
Members of the Court,

1. By order of 20 June 1984 the Court assigned Case 50/84, *Bensider and Others* v *Commission,* to the Fifth Chamber for preliminary consideration of the admissibility of the originating application.

The background to that development can be described in a few words. By application lodged at the Court Registry

1 — Translated from the Italian.