JUDGMENT OF THE COURT (FIFTH CHAMBER)
14 FEBRUARY 1984 [1]

SpA Alfer
v Commission of the European Communities

(ECSC — Exceeding delivery quotas — Fine)

Case 2/83

ECSC — Production — System of steel production and delivery quotas — Exceeding the delivery quota in a particular quarter — Reduction of deliveries in a subsequent quarter in order to compensate for the excess — Not permissible — Exceptional difficulties of the undertaking in observing the quota — Belated reaction by the Commission — Reduction in fine

(ECSC Treaty, Art. 58; General Decision No 1831/81, Art. 8, as amended by Decision No 2804/81, and Art. 12)

In Case 2/83

SpA ALFER, Pisogne (Brescia, Italy), represented by its managing director, Antonio Giordani, assisted by Cesare Castelli of the Brescia Bar, with an address for service in Luxembourg at the Chambers of Guy Thomas, 11a Boulevard Joseph-II,

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,

defendant,

1 — Language of the Case: Italian.

APPLICATION for Decision No 24/XI/82 — C(82) 1631/4 Def. of the Commission of the European Communities, notified to the applicant on 7 December 1982 and imposing on it a fine for an alleged infringement of certain Community rules, to be declared void or at least varied,

THE COURT (Fifth Chamber)

composed of: Y. Galmot, President of Chamber, Lord Mackenzie Stuart, O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: G. Reischl
Registrar: P. Heim

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

By Decision No 1831/81/ECSC of 24 June 1981 the Commission established a monitoring system and a new system of production quotas in respect of certain products for undertakings in the iron and steel industry (Official Journal 1981 L 180, p. 1). On the basis of that decision the Commission adopted Decision No 1833/81/ECSC of 3 July 1981 fixing the abatement rates for the third quarter of 1981. Pursuant to the latter decision it informed the company SpA Alfer (hereinafter referred to as "Alfer"), of Pisogne, by registered letter of 10 August 1981, that for the third quarter of 1981 (July, August and September), in addition to the reduction in production quotas, there would be a reduction in quotas for deliveries within the common market and that for Category V and VI products the production quota was 18 057 tonnes and the delivery quota 5 079 tonnes.

The great difference between the production and delivery quotas may be explained by the fact that Alfer is a processing undertaking, a large part of whose production is for other iron and steel undertakings.

By registered letter of 28 August 1981, Alfer informed the Commission that, whilst it had no comment on the production quota, the delivery quota allocated to it was clearly wrong since it had been calculated on an annual reference quantity which took no account of the fact that until June 1980 it had carried out processing for the company Acciaierie di Pisogne SpA, accounting for some 60% of its total production, and that this part of its production was then sold by the latter in the common market. When Acciaierie di Pisogne ceased business in July 1980 Alfer was obliged to sell that part of its production directly in the common market.

By letter of 4 November 1981 the Commission informed the applicant that it had increased the quarterly reference quantity to 23 217 tonnes with a corresponding increase to 15 091 tonnes of the delivery quota for the common market and that those amounts were to be substituted for those fixed in its previous letter of 10 August 1981. The Commission added that the provisions in question applied to the third quarter of 1981 but the undertaking was nevertheless authorized to carry forward to the fourth quarter the amounts allocated as a result of the increase in the quota which could not be used during the third quarter.

The increase in the delivery quota was made pursuant to the second indent of Article 8 (2) of Decision No 1831/81, as amended by Decision No 2804/81/ ECSC of 23 September 1981 (Official Journal 1981 L 278, p. 1).

The provision is worded as follows:

> "2. If an undertaking can prove that the reference quantities fixed in accordance with paragraph (1) have caused it grave difficulty, the Commission may make appropriate adjustments to the reference quantities for the undertaking concerned in cases where:
>
> ...
>
> The undertaking did not export more than 5% of its total production to non-Community countries over the 12 best months and its deliveries to the common market account for less than 90% of its total production over the best 12 months."

It is apparent from the aforesaid letter of 4 November 1981 that the increase in the delivery quota was calculated on the basis of a reference quantity amounting to 90% of Alfer's reference production.

By letter dated 25 February 1982 the Commission complained to Alfer under Article 36 of the ECSC Treaty that for the third quarter of 1981 it had exceeded by 2 402 tonnes the part of its production quota which could be delivered in the common market in respect of products of Categories V and VI.

In a letter dated 9 March 1982 Alfer stated that it was not until 4 November 1981 that it had been informed of the amount by which the quota for the third

quarter of 1981 was to be adjusted and that it was willing to reduce by 2 402 tonnes its deliveries in the common market in any one quarter in order to compensate for the aforesaid excess. those statements were repeated by the representatives of Alfer at a hearing on 11 June 1982.

Since it took the view that Alfer had admitted the facts with which it was charged and that the observations which it had made in its defence were irrelevant, the Commission, by the contested decision of 24 November 1982, imposed on Alfer a fine of 180 150 ECU, equal to LIT 241 498 281.

The application was received at the Court Registry on 6 January 1983.

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.

By order of 6 July 1983 the Court assigned the case to the Fifth Chamber.

II — Conclusions of the parties

Alfer claims that the Court should:

Declare the contested decision void and, wholly in the alternative, reduce the fine in an equitable manner;

Order the defendant to pay the costs.

The *Commission* contends that the Court should:

Find for the defendant;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

Alfer considers that the penalty is unlawful because the alleged infringement did not take place and the imposition of the penalty was manifestly unjust or, in the alternative, because the amount of the fine was excessive in relation to the facts.

Alfer makes three submissions.

The *first* is that there is no infringement. Since the Commission only notified Alfer of the quotas for the third quarter of 1981 in its letter of 10 August 1981, it cannot claim that they apply from 1 July 1981 since they are deemed to apply from the date of their notification. Alfer takes the view that the general decision of the Commission has legal effect either from the date of its publication in the Official Journal or from the date of its notification to the undertaking. In view of the non-automatic nature of the system, which provides that quotas are to be notified individually to the various undertakings, and the fact that it would have been necessary for Alfer to perform a calculation to determine its quotas before their notification, the decision could not have full effect from the date of its publication. The Commission was thus quite wrong in seeking to apply the decision retroactively.

At a practical level Alfer claims that it is impossible for logistic reasons connected with stocking, staff employed and firm orders to suspend production or, in the

present case, sales to compensate in a single month (September) for the increase in production and sales in the previous two months.

The *Commission* replies that the contested decision was published in the Official Journal on 4 July 1981 and that it is from that date that the undertakings should have had, or at least were deemed to have had, knowledge thereof. In the Commission's view the undertakings could, by means of a simple calculation, ascertain the quotas which could be delivered on the market. After denying that the alleged delay in the notification of the quotas had any practical or legal consequences, the Commission adds that, in view of the annual closure of the undertakings, it was practically impossible for an undertaking to exhaust its quota before the Commission officially notified it thereof at the beginning of August 1981.

The Commission maintains that Alfer was obliged to comply with Decision No 1831/81/ECSC from the date of its publication in the Official Journal and that in this particular case the individual decision was merely a measure applying the general decision and therefore conferred no new rights on the party in question, since the rights and duties of the undertakings had already been specified in the general decision.

The *second submission* is that the contested decision was manifestly unjust inasmuch as it failed to take into account in the present case that 60 to 70% of Alfer's business consisted of processing for another undertaking. In Alfer's view the delivery quota allocated to it could not be confined to the quantity actually sold during the period in which the special situation existed; it ought to have been calculated on the basis of the undertaking's actual production, that is to say according to the criteria which the Commission employed subsequently in Decision No 2804/81.

Alfer claims that there was a manifest lack of proportion between its own treatment and that of other undertakings in view of the fact that it was required to accumulate stocks in spite of the crisis affecting the industry and the undertaking itself. The accumulation of stocks was not possible both because of the lack of funds necessary for the purchase of material and the logistic impossibility of stocking material which was not authorized to be sold. Furthermore, the threat of difficulties with trade unions had to be taken into account by the undertaking. In addition, there was the distortion, in relation to other undertakings, arising from the possible need to reduce production for the aforesaid reasons in the event of the restriction of its sales. It is therefore clear that, confronted with the unlawful Commission decision. Alfer considered that it was under no obligation to comply therewith and to limit its sales to 5 079 tonnes.

Alfer emphasizes that when the Commission states in its decision that Alfer was not permitted to exceed the above-mentioned quota in the third quarter of 1981 because the amendment of the general decision, No 1831/81, did not take effect until 1 October 1981, it overlooks the fact that its first decision fixing Alfer's quotas was unlawful for the

above-mentioned reasons and that consequently the undertaking was under no obligation to comply therewith. Moreover, that fact was, by implication, admitted by the Commission when it increased the quota after the amendment of Decision No 1831/81.

As evidence of its good faith, Alfer maintains that it has always observed its production quotas and has reduced its sales quotas in proportion thereto.

The *Commission* observes that the second submission made by Alfer does not stand up to critical examination in view of the fact that Decision No 1831/81/ECSC was applied normally in the present case and Alfer's exceptional situation could not be taken into account under the regulation then in force. The Commission adds that Decision No 2804/81/ECSC was adopted specifically with the aim of taking into account exceptional cases such as that of Alfer.

The Commission concludes that it applied Decision No 1831/81 correctly and that it was not until after the adoption of Decision No 2804/81 that it was possible to take into account the observations made by Alfer in its letter of 28 August 1981.

In view of the size of the adjustment which the Commission made to the quotas and the amount by which Alfer exceeded its ultimate quota (2 402 tonnes), the Commission is of the view that Alfer did not attempt to limit its deliveries.

The *third submission* made by Alfer is that there is a manifest inconsistency in the contested decision. Although the Commission refused Alfer permission to compensate in the following quarters for exceeding its quotas, it authorized Alfer, in its letter of 4 November, to carry forward to the fourth quarter of 1981 the whole of the quantities referable to the increase in the quota allocated to Alfer which were not used during the third quarter of 1981. Alfer sees in the alleged inconsistency a patent defect vitiating the grounds of the contested measure.

As regards the third submission, the *Commission* observes that, by authorizing Alfer to carry forward to the following quarter any increase in quota not used during the third quarter of 1981, it sought to take account of the difficulties encountered by the undertaking and that the possibility was offered in order to meet a criterion of equity. As regards its refusal to authorize the undertaking to compensate for exceeding its quota during the one quarter by a reduction in deliveries during a subsequent quarter, the Commission points out that such authorization was impossible, since the quota system provides for quarterly quotas, and that the possibility of compensation by means of quarterly quotas corresponding to other quarters has always been excluded.

Finally, the Commission observes that if Alfer considered at the time that the quota allocated to it was unlawful it ought to have challenged it. Since it did not do so, it was obliged to comply with the measure in question.

As regards a reduction in the fine, the Commission refers to the arguments which it put forward against the claim for a declaration that the decision imposing the fine was void.

IV — Oral procedure

At the sitting on 16 November 1983 SpA Alfer, represented by C. Castelli, and the Commission, represented by S. Fabro, presented oral argument.

In answer to a question put by the Court, Alfer explained that it had no difficulty in relation to the quota system as regards sales between the date on which it ceased processing on behalf of Acciaieria di Posogne and the third quarter of 1981 since deliveries at the time were not subject to a quota.

The Advocate General delivered his opinion at the sitting on 14 December 1983.

Decision

1 By application lodged at the Court Registry on 6 January 1983, SpA Alfer (hereinafter referred to as "Alfer"), a company established in Pisogne, brought an action under the second paragraph of Article 36 of the ECSC Treaty requesting the Court to declare void an individual decision, Decision No C(82)1631/4 of the Commission of 24 November 1982, imposing a fine on the applicant pursuant to Article 58 (4) of the ECSC Treaty and Article 12 of the general decision, Decision No 1831/81 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), or, in the alternative, to reduce the fine imposed.

2 It appears from the documents before the Court that until June 1980 Alfer carried out processing for another company and that this accounted for approximately 60% of its production. In June 1980 the company for which Alfer worked went into liquidation. Since that date Alfer has therefore been obliged to sell its production solely on its own behalf.

3 By the aforesaid general decision, No 1831/81, the Commission introduced a new quota system imposing on every undertaking a quaota not only on its production but also on the part thereof which could be delivered in the common market. For the purpose of fixing the production and delivery

quotas, the system was based on a reference period which coincided with the period during which Alfer was still carrying out processing for another undertaking.

4 It was for that reason that the Commission, on the basis of Decision No 1833/81 of 3 July 1981 fixing the rates of abatement for the third quarter of 1981 in pursuance of Decision No 1831/81 (Official Journal 1981 L 184, p. 6), allocated to Alfer for the said quarter a production quota of 18 057 tonnes for products of Categories V and VI, whereas its delivery quota was only 5 079 tonnes. The communication notifying Alfer of those quotas was dated 10 August 1981.

5 On 28 August 1981 Alfer sent a letter to the Commission informing it that, although Alfer had no objection to the production quota, it could not, on the other hand, accept the delivery quota, since it had been calculated on a reference quantity based on a period during which Alfer carried out processing for another undertaking accounting for approximately 60 % of its total production, that part of its production subsequently being sold by the other undertaking in the common market.

6 Alfer received no reply to that letter, but the Commission, by Decision No 2804/81 of 23 September 1981 (Official Journal 1981 L 278, p. 1), provided itself with a legal basis for remedying situations such as that of Alfer. Article 8 of Decision No 1831/81, as amended by Decision No 2804/81, provides that, if an undertaking can prove that the reference quantities fixed have caused it grave difficulty, the Commission may make appropriate adjustments thereto *inter alia* in a case where the undertaking's deliveries in the common market account for less than 90% of its total production over the best 12 months.

7 By letter dated 4 November 1981 the Commission therefore informed Alfer that, on the basis of the above-mentioned article, it was increasing its delivery quota to 15 091 tonnes for the third quarter of 1981. It is apparent from the letter that the increase in the delivery quota was calculated on the basis of a reference quantity equal to 90% of Alfer's reference production,

that is to say the maximum provided for by Decision No 2804/81. Since Alfer was notified of the new quota after expiry of the third quarter, the Commission authorized Alfer to carry forward to the fourth quarter that part of the increase in the quota which could not be used during the third quarter.

8 Alfer has not challenged before the Court either the first communication, dated 10 August 1981, or the second, dated 4 November 1981, notifying it of the quotas.

9 By letter dated 25 February 1982, the Commission complained that Alfer had exceeded by 2 402 tonnes the delivery quota specified in the second communication and invited it to submit its observations pursuant to Article 36 of the ECSC Treaty. In its reply of 9 March 1982, Alfer stated *inter alia* that it was prepared to reduce by 2 402 tonnes its deliveries in the common market during a subsequent quarter in order to compensate for the aforesaid excess.

10 By the contested decision of 24 November 1982, the Commission found that the quota had been exeeded and, applying the normal rate of 75 ECU per tonne provided for in Article 12 of Decision No 1831/81, imposed on Alfer a fine of 180 150 ECU, that is to say LIT 241 498 291.

11 By its present application, Alfer seeks a declaration that the decision is void or, in the alternative, a reduction in the fine. In support of its application it claims that the first quota notified to it on 10 August 1981 was manifestly unjust, that the second quota notified to it on 4 November 1981 was not received until after the expiry of the third quarter and was therefore retroactive and that the Commission acted inconsistently in authorizing Alfer to carry forward the unused part of the quota to the following quarter, whilst refusing Alfer's offer to reduce deliveries in a subsequent quarter in order compensate for the excess.

12 The first two submissions cannot be upheld since they relate to two individual decisions which were not challenged before the Court in due time. As regards the third submission, it must be observed that a reduction of

deliveries during a subsequent quarter cannot rectify a previous irregularity, since the quota system is applied on a quarterly basis.

13 The Commission was therefore correct in finding, in the contested decision, that the applicant had failed to comply with its obligations under Community law and in imposing a fine on it. Consequently, the claim for a declaration that the contested decision is void must be dismissed.

14 Since the applicant has claimed, in the alternative, that the fine should be reduced, it is necessary to examine whether the circumstances to which it refers can justify such a reduction.

15 The Commission admits that the quota set out in its first communication was unjust and that the second was notified to the undertaking too late for it to be able to adjust its deliveries for the quarter in question. It emphasizes, however, that at the time the general decision in force did not allow it to take account of the undertaking's difficulties, that by Decision No 2804/81 of 23 September 1981 it obtained as quickly as possible the legal basis necessary for that purpose, that in allocating the quota notified to Alfer on 4 November 1981 it made full use thereof and that the fact that Alfer exceeded even that maximum quota shows a lack of effort on the part of Alfer to limit its deliveries during the quarter in question.

16 It is clear from the quota system and in particular Decision No 1833/81 fixing the rates of abatement for the third quarter of 1981 that the quotas fixing the quantities which could be delivered in the common market were, in any event, appreciably lower than those imposed on production. In delivering in the common market almost the whole of its production quota, which it had in no way challenged, Alfer failed to act prudently.

17 On the other hand, it must be admitted that the Commission could have foreseen such situations and should have drafted its general decisions in a manner which would have enabled it to rectify them quickly. In any event,

Alfer rightly complains that the Commission took no action in its case until its decision of 4 November, that is to say, well after the end of the quarter in question, whereas it was aware of the problem confronting the undertaking on receipt of its letter of 28 August. Since it was thus informed of the exceptional difficulties encountered by the undertaking in observing the delivery quota allocated by the first decision, the Commission ought to have indicated in good time what its interventions were with regard to remedying the unjust situation and how the undertaking might tackle its difficulties without incurring the risk of exceeding the final quota. In view of those omissions, the Commission must bear a large part of the responsibility for the fact that the quota was exceeded.

18 On the basis of those considerations, the fine must be reduced from 180 150 to 20 000 ECU, that is to say LIT 26 810 800.

Costs

19 Pursuant to Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful so far as the most important aspect of the case is concerned, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Reduces the fine imposed on the applicant from 180 150 ECU to 20 000 ECU, that is to say LIT 26 810 800;**

2. Dismisses the remainder of the application;

3. Orders the Commission to pay the costs.

Galmot Mackenzie Stuart

Due Everling Kakouris

Delivered in open court in Luxembourg on 14 February 1984.

For the Registrar

H. A. Rühl

Principal Administrator

Y. Galmot

President of the Fifth Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 14 DECEMBER 1983 [1]

Mr President,
Members of the Court,

On 10 August 1981 the Commission notified the applicant in these proceedings of its production quota for Category V and VI products for the third quarter of 1981, pursuant to Decision No 1831/81 (Official Journal L 180, 1. 7. 1981, p. 1), as amended by Decision No 1832/81 (Official Journal L 184, 4. 7. 1981, p. 1), and informed it that of that quota, which amounted to 18 057 tonnes, 5 079 tonnes could be delivered in the common market.

The applicant has no objection to the above-mentioned production quota, but does object to the restriction on its deliveries in the common market. It informed the Commission in a letter dated 28 August 1981 that until June 1980 60% of its production was for another undertaking and, since that part of its production was disposed of in the common market by the other undertaking, it had not been taken into account in determining the applicant's reference quantity pursuant to Article 8 of Decision No 1831/81. However, the other undertaking for which the applicant had carried out the processing ceased trading in July 1980 and the

1 — Translated from the German.