JUDGMENT OF THE COURT (FIRST CHAMBER)
15 MARCH 1984 [1]

Industrie Riunite Odolesi SpA v Commission of the European Communities

(Steel production quotas — Orders from non-member countries)

Case 348/82

1. *Objection of illegality — Measures of which the illegality may be pleaded — Individual decisions — Exclusion*
   (ECSC Treaty, Art. 36, third para,)

2. *ECSC — Production — System of production quotas for steel — Exceeding of quotas — Order from a non-member country — Uncertainty about the inclusion in the quota system of the products at issue — Inclusion decided later — Facts in justification — None*
   (ECSC Treaty, Art. 58; General Decisions No 1831/81 and No 1832/81)

In Case 348/82

INDUSTRIE RIUNITE ODOLESI SPA, whose registered office is in Odolo (Brescia, Italy), represented by Desiderio Leali, Managing Director, and by Gino Alberto Bergmann, of the Milan Bar, Fabrizio Massoni, of the Brussels Bar, and Gerolamo Pellicano, of the Milan Bar, with an address for service in Luxembourg at the Chambers of André Elvinger, 15 Côte d'Eich,

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, Jean Monnet Building, Kirchberg,

defendant,

1 — Language of the Case: Italian.

APPLICATION for a declaration that Commission Decision No C(82) 1631/3 of 24 November 1982 concerning a fine imposed on the applicant under Article 58 of the ECSC Treaty is void,

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: G. Reischl
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

Faced with a manifest crisis in the steel market within the meaning of Article 58 of the ECSC Treaty, the Commission, by general Decision No 2794/80/ECSC of 31 October 1980 (Official Journal L 291, p. 1), instituted a monitoring system and a system of production quotas for the period between 1 November 1980 and 30 June 1981. By general Decision No 1831/81 of 24 June 1981 (Official Journal L 180, p. 1), the Commission extended the monitoring system and the system of production quotas for products of the steel industry, subject to certain amendments, to cover the period between 1 July 1981 and 30 June 1982.

According to Article 5 of Commission Decision No 1831/81/ECSC the Commission is to fix production quotas on a quarterly basis for several groups of products. According to Articles 6 to 10, those quotas are to be fixed for each undertaking on the basis of the reference production of that undertaking and by the application of abatement rates to the reference production. Article 9 provides that the Commission is to inform each undertaking of its reference production and the production quotas resulting from an application of the abatement rates.

By a letter of 14 July 1981, at which date the production quotas for the third quarter of 1981 had not yet been fixed, the applicant asked the Commission to adjust them, pursuant to Decision No 2794/80/ECSC, because it had accepted an order for export to a non-member country, to wit Libya.

By a letter dated 4 August 1981, the Commission informed the applicant of its reference production and production quotas for different types of steel products in respect of the third quarter of 1981.

The applicant did not contest that decision in any legal proceedings.

By a letter dated 7 August 1981, the Commission expressly refused the request of 14 July 1981, pointing out, on the one hand, that the method of calculation determined by Decision No 1831/81/ECSC, as amended by Decision No 1832/81/ECSC of 3 July 1981 (Official Journal L 184, p. 1), had definitively determined the reference periods, and, on the other hand, that the reference production had already been calculated so as to take account of the applicant's special circumstances.

The applicant protested in various letters against the refusal of its request, but did not take any legal action.

By Decision No C(82) 1631/3 of 24 November 1982 the Commission found that the applicant had exceeded the production quota allocated to it for the third quarter of 1981 by 4 999 tonnes in respect of product Categories V (reinforcing bars) and VI (merchant bars). On that basis, it imposed a fine of 374 925 ECU, or LIT 502 601 959. The applicant was notified of that decision on 6 December 1982.

By application lodged at the Court Registry on 31 December 1982, the applicant brought an action under Article 33 of the ECSC Treaty claiming that the decision of 24 November 1982 imposing the fine should be declared void or, in the alternative, that the fine should be reduced.

On 15 March 1983, the applicant also made an application for the adoption of an interim measure suspending the operation of the contested decision. The President of the Court, by order of 20 April 1983, ordered that operation of the decision be suspended on condition that the applicant first produced a bank guarantee for payment of the fine imposed by the contested decision and default interest calculated at 1% above the discount rate fixed by the Bank of Italy.

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 decided in application of Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the First Chamber.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. On a preliminary basis, suspend the operation of the Commission Decision of 23 November 1982;

2. Declare the contested decision void;

3. In the alternative, reduce the fine imposed by the aforementioned decision;

4. In the further alternative, defer payment of the fine;

5. Order the defendant to pay the costs.

The *Commission* contends that the Court should:

1. Dismiss the application as inadmissible;

2. In the alternative, dismiss it as unfounded;

3. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The *applicant* does not contest the facts alleged in the decision. It acknowledges in particular that it exceeded the quota allocated to it for the third quarter of 1981. It points out however that that was caused by production intended for export to Libya, whose order had been accepted on 6 April 1981, that is, before Decision No 1831/81/ECSC came into force. It accepted that order believing that exports to non-member countries were encouraged by the Commission, the applicant having obtained, for the fourth quarter of 1980, an adjustment of its production quota so as to be able to fulfil an exceptional contract for export to Libya. The Commission authorized that adaptation by a letter of 23 November 1980, emphasizing in particular that it was "in the interest of the Community steel industry to maintain these patterns of exports."

After a new system of production quotas had been established by Decision No 1831/81/ECSC of 24 June 1981, the applicant immediately asked the Commission, by letter of 14 July 1981, to adjust its quotas so that it could fulfil the new order of 6 April 1981. However, the Commission, in flagrant contradiction with the guidelines which it had earlier set out in its letter of 23 November 1980, did not approve that adjustment. The applicant adds that that Commission decision caused it considerable damage, in view of the fact that it had already sent to Libya in the meantime a large part of the order representing 70% of the production authorized for the third quarter of 1981. Consequently, it could not completely meet the new order, which laid it open to complaints from its customers.

According to the applicant, the Commission's conduct in this case is manifestly incompatible with Article 14 of Decision No 2794/80/ECSC, pursuant to which the Commission may modify the quotas where exceptional difficulties are entailed.

The applicant also considers that the Commission, by refusing to adjust the quotas at the time, did not take account of Article 14 of Decision No 1831/81/ECSC, as amended by Decision No 1832/81/ECSC. In so far as it is relevant to this case, that article is formulated in the following terms:

"If, by virtue of the scale of the abatement rates imposed in respect of a given quarter, the quota system creates exceptional difficulties for an undertaking, the Commission shall make suitable adjustments to the reference production for the categories in question (. . .) in the following instances:

(. . .)

The total reference production for Categories V and VI comes to less than 60 000 tonnes and the abatement rate exceeds 20%."

According to the applicant, the above-mentioned Article 14 leaves the Commission no discretion, but rather requires it to adjust the quotas if, as in this case, the conditions are met. Furthermore, during the reference period of three years, the applicant undertaking has already reduced its production by 75%, putting its survival in jeopardy. In those circumstances, the Commission was not entitled to refuse to adjust its quota. What is more, that penalty imposed upon it by the contested decision is completely inequitable.

The *Commission* considers all the applicant's observations to be without foundation.

In the first place, it is impossible to understand why the applicant, having received a major order for export to Libya on 6 April 1981, did not immediately seek an adjustment of its quota because of the exceptional exports but waited until July 1981 before doing so. That request, based on Decision No 2794/80/ECSC, is absolutely inadmissible because at the date on which it was made, Decision No 2794/80/ECSC was no longer in force.

In the second place, the Commission contends that the adjustment requested on 14 July 1981 could not be granted pursuant to Article 14 of Decision No 1831/81/ECSC, since the applicant's situation at that time did not correspond to one of the conditions laid down. Article 14 makes any adjustment of the quota subject to a condition relating to production, which, as regards products in Categories V and VI, must be less than 60 000 tonnes per year whereas the applicant had a reference production of 102 706 tonnes per year.

Finally, the Commission points out that the applicant had already had the benefit of adjustments of its quota for the fourth quarter of 1980 so as to be able to export to non-member countries. It was also allowed to produce during the first quarter of 1981 the additional quota granted for those exports. Furthermore, the applicant obtained, pursuant to Decision No 2794/80/ECSC, two other reappraisals of its production quotas relating to the first and second quarters of 1981. In calculating the new quotas for the third quarter of 1981, the Commission applied Article 7a of Decision No 1832/81/ECSC, according to which the calculation of the reference production for the new quotas is to take account of the quotas allocated during the period of application of Decision No 2794/80/ECSC, including all the adjustments granted pursuant to that decision. Consequently, the Commission considers that it has taken proper account of the applicant's special situation.

The Commission is opposed to a reduction in the fine imposed, because the applicant itself took the risk of filling a large order knowing that there was a system of production quotas leaving very little room for manoeuvre. The applicant undertaking should have restricted itself to producing the tonnage allowed under its quota for the third quarter of 1981.

As regards the request to extend the time allowed for payment, the Commission points out that there are no special reasons to consider that either. It emphasizes that special terms of payment are granted only to undertakings facing economic difficulties, which is not the position in this case.

IV — Oral procedure

The parties presented oral argument at the sitting on 29 September 1983.

The Advocate General delivered his opinion at the sitting on 1 December 1983.

Decision

1 By application lodged at the Court Registry on 31 December 1982, the company IRO — Industrie Riunite Odolesi SpA, whose registered office is in Odolo, Province of Brescia (Italy), brought an action, pursuant to the second paragraph of Article 33 and the second paragraph of Article 36 of the ECSC Treaty seeking a declaration that Commission Decision No C(82) 1631/3 of 24 November 1982 concerning a fine imposed on the undertaking IRO — Industrie Riunite Odolesi SpA under Article 58 of the ECSC Treaty is void, or, in the alternative, a reduction of the fine imposed by that decision or, in the further alternative, deferment of payment of that fine.

2 The contested decision finds that the applicant had exceeded the production quota allocated to it for the third quarter of 1981 by 4 999 tonnes in respect of product Categories V (reinforcing bars) and VI (merchant bars) and imposes in respect of the excess a fine of 374 925 ECU, or LIT 503 601 959.

3 The applicant does not deny that the quota was exceeded but contends that that was due to the contradictory and inequitable attitude of the Commission which, after having appeared to encourage export of steel products to non-member countries, suddenly refused to allow the applicant to produce the quantities necessary to fulfil an order for delivery to a non-member country. The Commission refused to take account of an order for 30 000 tonnes of reinforcing bars to be exported to Libya when it determined, on 4 August 1981, the applicant's production quota for the third quarter of 1981 and when it refused, on 7 August 1981, the application to adjust the quota to the special circumstances of the applicant's undertaking, whereas the Commission itself had, at the time of an earlier Libyan order in 1980,

informed the applicant that it was "in the interest of the Community steel industry to maintain these patterns of export".

4 On the basis of these allegations of fact, the applicant claims first of all that the Commission was required to adjust its quota, both on the basis of Article 14 of general Decision No 2794/80/ECSC of 31 October 1980 establishing a system of steel production quotas for undertakings in the iron and steel industry (Official Journal L 291, p. 1) and on that of general Decision No 1831/81/ECSC 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 L 180, p. 1).

5 The applicant then invokes the same circumstances in support of its contention that the amount of the fine imposed upon it is disproportionate to the offence committed. It points out that its undertaking, which is small in size, could not have survived the loss of the Libyan contract which the abandonment of the new Libyan order would have entailed.

6 It must be pointed out first of all that the first of these two submissions amounts to a challenge to the legality of the decisions of 4 and 7 August 1981 by which the Commission respectively determined the applicant's production quota for the third quarter of 1981 and refused the applicant's request to adjust the quota. However, those decisions have become definitive by virtue of not having been contested within the periods provided by the Treaty. It is clear from an established body of case-law that an applicant cannot, in the course of an application directed against an individual decision, put forward an objection of illegality against other individual decisions addressed to it, which have become definitive.

7 In those conditions, it is pointless for the applicant to plead the illegality of the aforementioned decisions of 4 and 7 August 1981. The first submission must therefore be dismissed.

8 In its second submission, the applicant asks the Court, in exercise of the unlimited jurisdiction conferred upon the Court by the second paragraph of Article 36 of the ECSC Treaty, to reduce the amount of the fine imposed upon it.

9 It is necessary in this context to examine the factual circumstances in which the infringement at issue was committed. Whilst it is true that the applicant did not request the adjustment of its quota when it accepted the Libyan order in April 1981 and that it made such a request only towards the middle of July, referring to general Decision No 2794/80 which had already expired, it is also true that during the months of May and June 1981, when the applicant was starting to fulfil the Libyan order, the undertakings involved were uncertain whether or not reinforcing bars would be included in the new system of production quotas which would apply after 30 June 1981. It should not be forgotten that reinforcing bars were only finally included on 3 July 1981 by general Decision No 1832/81 including them and merchant bars in the new system of production quotas (Official Journal L 184, p. 1), which amended general Decision No 1831/81 which had already come into force on 1 July.

10 These circumstances are not however sufficient to exonerate the applicant from the criticisms made of it by the Commission. Account must be taken of the fact that the Libyan order of April 1981 was for 30 000 tonnes, a quantity considerably above the quarterly production quota normally allocated to the applicant. The prudence required of every undertaking operating in a regulated market like that in steel products in 1981 should have caused the applicant to take the necessary precautions and to apply at once for the necessary adjustment of the quotas allocated to it, so as to be able to contest any unjustified refusal. The mere fact that the Commission, in its earlier correspondence with the applicant, had referred in general terms to the "interest of the Community steel industry" in maintaining the patterns of exports to non-member countries, is not such as to discharge the applicant from that obligation.

11 Finally, it must be noted that the fine imposed was calculated on the basis of 75 ECU per tonne of excess, whilst the total excess, being greater than 10% of the quota, would have permitted the application of a higher rate of fine, pursuant to Article 12 (2) of general Decision No 1831/81.

12 In the light of these circumstances, the Court considers that there are no grounds for reducing the fine imposed.

13 As regards the applicant's alternative claim for a suspension of the payment of the fine, for which no grounds have been advanced, it is sufficient to note that the Commission has declared itself prepared to grant special conditions of payment to undertakings facing major economic difficulties. It is for the applicant to make a reasoned application to the Commission so as to obtain a postponement if appropriate.

14 Consequently, the application must be dismissed in its entirety.

Costs

15 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. The applicant, having failed in its submissions, must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 15 March 1984.

For the Registrar

D. Louterman
Administrator

T. Koopmans
President of the First Chamber