JUDGMENT OF THE COURT (Third Chamber)
21 March 1985 *

In Case 66/84

Ferriere di Borgaro SpA, having its registered office at Borgaro Torinese, acting through its legal representative, Giulio Ferrero, represented by Giuseppe Marchesini, Advocate at the Corte Suprema di Cassazione, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 Rue Philippe-II,

applicant,

v

Commission of the European Communities, 200 Rue de la Loi, Brussels, represented by Oreste Montalto, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, also a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission's decision of 26 January 1984 imposing a fine on the applicant under Article 58 of the ECSC Treaty is void or alternatively for the amendment of that decision,

THE COURT (Third Chamber)

composed of: C. Kakouris, President of Chamber, U. Everling and Y. Galmot, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

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gives the following

* Language of the Case: Italian.

** after hearing the Opinion of the Advocate General delivered at the sitting on 31 January 1985,

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 13 March 1984, Ferriere di Borgaro SpA, whose registered office is at Borgaro Torinese, brought an action under the second paragraph of Article 36 of the ECSC Treaty for a declaration that the Commission's decision of 26 January 1984 concerning a fine imposed under Article 58 of the ECSC Treaty is void or alternatively for the amendment of that decision.

2 The contested decision states in Article 1 that 'the exceeding by 1 265 tonnes of the production quota for Category VI products notified to Ferriere di Borgaro SpA for the first quarter of 1982 constitutes an infringement of Decision No 1831/81/ECSC' and in Article 2 consequently fines the undertaking 71 857 ECU, or LIT 98 609 361.

3 It should be pointed out that Commission 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) relaxed the system of steel production quotas originally introduced by Commission Decision No 2794/80 of 31 October 1980 (Official Journal 1980, L 291, p. 1) in so far as only the production of certain categories of rolled products excluding crude steel production remained subject to the quota system.

4 Ferriere di Borgaro produces special steels and ordinary steel billets of less than 50 mm thickness. Under the system established by Decision No 2794/80, it mistakenly declared the billets in question in its quota for crude steel and not in its quota for rolled products. Consequently, under the system established by Decision No 1831/81 it was allocated a production quota for merchant bars which was much lower than its previous production. More specifically, for the quarter in question, the first quarter of 1982, its production quota was fixed at 1 185 tonnes and the proportion of production which could be delivered on the common market at 1 169 tonnes.

5 Considering those quantities inadequate, the undertaking asked for them to be increased in telex messages sent on 19, 22 and 28 January and 22 and 31 March 1982. However, the Commission did not comply with that request until 19 April 1982 by a decision increasing the production quota to 5 419 tonnes and the proportion of production which could be delivered on the common market to 5 646 tonnes. That amendment was preceded by an on-the-spot check of the applicant's declarations made by the Commission's inspectors on 27 February 1982.

6 The production quantities were not therefore fixed correctly until after the quarter in question had ended. In the meantime, the applicant had exceeded its production quota for that quarter by 1 265 tonnes, as was found in the contested decision. However, the applicant then restricted its production so that it stayed 788 tonnes below its production quota for the second quarter of that year.

7 The considerations on which the Commission based the contested decision fining the applicant, as stated in the preamble thereto, are that 'the production quota for the first quarter of 1982 and the proportion of that quota which may be delivered on the common market were initially fixed by the Commission on the basis of production and reference quantities which were incorrectly stated by Borgaro — a fact which makes it liable to the fines and periodic penalty payments provided for in Article 47 of the ECSC Treaty; the incorrect declaration cannot be regarded as an accidental and isolated event since from July 1981 it has ceased declaring its production for the purposes of the levy and no longer pays the levy, which has been the subject of a Commission decision of 3 June 1983 requiring the undertaking to pay the sums due under the provisions relating to the ECSC levy'.

8 On the question of the amount of the fine, the preamble first states that under Article 58 of the ECSC Treaty it may be equal to the value of the excess production. It then states that under Article 12 of Decision No 1831/81, the fine is generally to be 75 ECU for each tonne in excess and that the fine may be up to double that amount if an undertaking's production exceeds its quota by 10% or more or if the undertaking has already exceeded its quota or quotas during one of the previous quarters.

9 The preamble to the contested decision goes on to state that in the case of undertakings with a negative balance sheet the fine should be increased by 10% to 82.5

ECU for each tonne in excess if the undertaking has already exceeded its quota or quotas during one of the previous quarters or if it has exceeded its quotas by 10% or more. With regard to the present case, it is stated that 'in view of the undertaking's state of uncertainty in the first quarter of 1982 and its willingness to offset the excess production of the first quarter and therefore to rectify the situation to some extent, the fine imposed for the excess production which was offset, namely 788 tonnes, should be calculated at the rate of 41.25 ECU per tonne, that is at half the rate applicable to the excess production which was not offset, namely 477 tonnes'.

10 In this action, the applicant seeks to have the contested decision fixing the fine declared void and in the alternative to have the fine reduced. To that end it advances two submissions alleging misuse of power and the manifest injustice of the decision.

Misuse of powers

11 On this question, Ferriere di Borgaro contends that the Commission has, by means of a decision imposing a penalty for exceeding a quota, sought in fact to penalize an infringement concerning the levy and the duty to provide information. It argues that this is clear from the recitals of the preamble to the decision which link the findings relating to the incorrect declarations of production and reference quantities to the findings that the applicant has also failed to declare its production for the purposes of the levy and has stopped paying the levy.

12 The Commission, on the other hand, states that those recitals show in fact that the infringements concerning the levy and the duty to provide information were the subject of a separate decision. In the passage in question it simply wished to make clear that the initial allocation of incorrect quotas was the fault of the applicant itself which had failed to provide correct information.

13 It is clear from the actual wording of the recital in question, quoted above, that the recital was meant to support the finding that the initial incorrect fixing of the production quota was the direct consequence of the applicant's failure to fulfil its obligations regarding the declaration of its production. Indeed, the reference to the decision of 3 June 1983, which was adopted in order to penalize the breach of obligations concerning payment of the levy, shows precisely that that breach was not the subject of the decision which is challenged in this case. In those circum-

stances, it cannot be said that the contested decision had a purpose other than to penalize the exceeding of the quota in question.

14 This submission must therefore be rejected.

Manifest injustice of the decision

15 Secondly, as far as concerns the submission that the decision is manifestly unjust, Ferriere di Borgaro contends that the Commission failed to take into consideration the specific circumstances in which the quota was exceeded and in particular the fact that the excess was imputable to the Commission. It argues first of all that it was not clear how billets of less than 50 mm thickness were to be classified under the system established by Decision No 2794/80; what is more, the Commission's inspectors did not draw its attention to the fact that it had declared those products incorrectly. Its second point is that the cases in which undertakings are exempt from the quota system are not clearly defined in the Community provisions and that consequently it could not have known that it was required to declare its production. Finally, the applicant complains that the Commission did not take sufficient account of the fact that, in spite of repeated requests, the decision rectifying the matter was not adopted until after the relevant quarter had expired.

16 The Commission, on the other hand, argues that the applicant is primarily responsible for exceeding its quota: its incorrect declarations as to the nature of its production were the cause of the initial incorrect allocation of its quota. The Community rules on the classification of the products in question are clear. Decision No 2794/80 refers in this regard to Eurostat Questionnaires Nos 2-13 and 2-11 which in turn refer to Euronorms which are distributed to the undertakings concerned. It is also clear from the Community legislation that the applicant does not qualify for exemption from the quota system. Finally, the argument that the Commission was slow to adopt its decision cannot be accepted since the period of three months which elapsed between the first request for rectification and the adoption of the decision rectifying the matter was reasonable having regard in particular to the fact that it was first necessary to carry out an on-the-spot inspection. In any event, by 22 March 1982 at the latest, the applicant possessed all the information it needed to calculate its quota itself, as is shown by the telex message which it sent on that day, and furthermore the attenuating circumstances connected with the alleged delay had already been taken into account in the decision.

17 It must be pointed out first of all that under the provisions of Decision No 2794/80 the applicant was required — and this is not disputed — to declare its steel production to the Commission and to specify the proportion of its production consisting of crude steel and the proportion consisting of rolled products. It must therefore bear the responsibility for the consequences of any incorrect declaration, regardless of whether it is the quantity of its total production or its breakdown into the various groups of products that is given incorrectly. It cannot escape that responsibility by claiming that the Commission's inspectors responsible for ensuring that the Community rules are observed did not notice from the outset that its declarations were incorrect.

18 Nor can the applicant escape or reduce its responsibility for the consequences of its incorrect declarations by arguing that the Community legislation does not make it sufficiently clear how the billets in question are to be classified. It is in fact clear from the information provided by the Commission and not disputed by the applicant that, through the reference to Eurostat Questionnaires Nos 2-11 and 2-13, Decision No 2794/80 is referring to Euronorms and that those standards, which had been distributed to the undertakings concerned, show that steel billets of less than 50 mm thickness are rolled products within the meaning of Annexes I and II/2 to Decision No 2794/80 and not crude steel within the meaning of Annex II/1 to that decision.

19 Nor can the applicant rely on the fact — which is disputed by the Commission — that it was possible for it to take the view that it was not subject to the quota system before the first quarter of 1982. That argument cannot be accepted since the obligation to provide information is independent of the exemption. In fact, Article 4 of Decision No 1831/81, as amended by Decision No 1832/81, expressly provides that the exemption from the quota system applies 'without prejudice to the obligations with regard to information and checks provided for in this Decision'.

20 However, as regards the argument that the decision to rectify the production quota was adopted after undue delay, it must be accepted that, although, as was stated above, the applicant bears the responsibility for the error in the original quota allocation, that circumstance cannot discharge the Commission from its duty to rectify the quota as quickly as possible once it had been notified by the applicant of its error and the necessary investigations had confirmed that an error had been made. In the present case, the first request for rectification was sent to the Commission on 19 January 1982 and on-the-spot investigations were carried out by the Commission's inspectors on 27 February 1982. However, the rectifying

decision was not adopted until 19 April 1982, that is to say after the quarter in question had expired, three months after the first request for rectification was made and nearly two months after the on-the-spot inspection.

21 In those circumstances, the Court must take the view that the Commission failed to rectify its erroneous decision in good time and that that failure made it impossible for the applicant to plan its production correctly so as to avoid exceeding the quota allocated to it for the quarter in question. Even accepting the Commission's argument that the applicant ought to have been able, at least by March 1982, to calculate its quota itself, the Commission none the less did not give the applicant any appropriate indication to that effect, there being no evidence on the file to suggest that, before notifying the rectifying decision to the applicant, the Commission's officers informed it what final quota it should expect.

22 Although those circumstances do not alter the fact that the quota excess in question constitutes an infringement of the Community rules and cannot therefore justify the annulment of the contested decision, they may be grounds for reducing the fine.

23 According to Article 12 of Decision No 1831/81, the fine must be fixed at 75 ECU for each tonne in excess except in certain exceptional cases — one of which is where a quota is exceeded by 10% or more — justifying a departure from that rate of fine. Although the quota allocated was in fact exceeded by more than 10% in the present case, it should be taken into consideration that the applicant was in a state of uncertainty in the relevant quarter owing to the Commission's slowness in adopting the rectifying decision and that the applicant considerably reduced its production in the following quarter. In view of those circumstances it seems appropriate in principle to calculate the fine at the standard rate, without any increase, that is to say 75 ECU for each tonne of excess production.

24 However, in so far as the applicant offset that excess by reducing its production in the following quarter, it is appropriate in view of the special circumstances of this case, which left the applicant in a prolonged state of uncertainty about its quota, to fine it at a rate equal to one third of the standard rate for the excess production which was offset, namely 788 tonnes, that is to say 25 ECU for each excess tonne.

25 For all those reasons the fine imposed must be reduced to 477 × 75 ECU + 788 × 25 ECU which equals 55 475 ECU (LIT 76 128 342) and the rest of the application must be dismissed.

Costs

26 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs. However, under Article 69 (3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order the parties to bear their own costs in whole or in part.

27 Since both the applicant and the Commission have failed in some of their submissions, they should be ordered to bear their own costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Reduces the fine imposed on the applicant to 55 475 ECU (LIT 76 128 342);

(2) Dismisses the rest of the application;

(3) Orders the parties to bear their own costs.

Kakouris Everling Galmot

Delivered in open court in Luxembourg on 21 March 1985.

For the President of the Third Chamber

P. Heim
Registrar

A. J. Mackenzie Stuart
President