

ORDER OF THE COURT
5 March 1993 *

In Case C-102/92,

Ferriere Acciaierie Sarde SpA, a company incorporated under Italian law, whose registered office is in Cagliari (Italy), represented by Giuseppe Michele Giacomini and Giuseppe Conte, of the Genoa Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Antonino Abate, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 91/547/ECSC of 5 June 1991 concerning aid granted by the Autonomous Region of Sardinia to Ferriere Acciaierie Sarde (OJ 1991 L 298, p. 1),

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco, P. J. G. Kapteyn and D. A. O. Edward, Judges,

Advocate General: C. Gulmann,
Registrar: J.-G. Giraud,

after hearing the Advocate General,

* Language of the case: Italian.

makes the following

Order

- 1 By application lodged at the Court Registry on 27 March 1992, Ferriere Acciaierie Sarde SpA ('FAS') brought an action under the third paragraph of Article 33 of the ECSC Treaty or the second paragraph of Article 173 of the EEC Treaty, for annulment of Commission Decision 91/547/ECSC of 5 June 1991 concerning aid granted by the Autonomous Region of Sardinia to Ferriere Acciaierie Sarde.
- 2 On 26 January 1989 the Italian authorities notified the Commission, first, of a system of aid established by a regional Law No 41 of 14 September 1987 aimed at encouraging the protection of the environment of the Island of Sardinia by granting aid for the selective disposal, recycling and reutilization of waste, and secondly of aid granted under that system in 1987 to the FAS of LIT 1 796 000 million. The Commission approved the system provided that undertakings coming under the ECSC Treaty were not allowed to benefit from the aid, a condition which the Italian authorities, by letter dated 24 April 1990, agreed to observe.
- 3 On 8 June 1990 the Italian authorities informed the applicant that they intended to recover the aid which they had paid it and were studying the terms for recovery. On 26 November 1990 they informed the Commission that the repayment was still being negotiated with FAS.
- 4 Since no repayment plan had been agreed, however, the Commission, on 19 December 1990, initiated the procedure provided for in Article 6(4) of its Decision No 322/89/ECSC of 1 February 1989 establishing Community rules for aid to the steel industry (OJ 1989 L 38, p. 8) and gave the Italian authorities notice to submit their observations on the measures in question. The letter was published

in the *Official Journal of the European Communities* of 7 February 1991 (C 32, p. 4) as a communication addressed 'to other Member States and interested parties concerning aid granted by Italy to Ferriere Acciaierie Sarde', in order that they might also submit their observations on the subject.

- 5 Following the observations submitted by the Italian authorities and a trade association in connection with the procedure the Commission adopted, on 5 June 1991, the aforementioned Decision 91/547 which is the subject of this application.
- 6 That decision states that the aid granted in 1987 by the authorities of the Autonomous Region of Sardinia to FAS is illegal State aid, as it was granted without prior authorization from the Commission and is also incompatible with the common market, and provides that the aid is therefore to be withdrawn through recovery. The Italian Government was notified of the decision on 27 June 1991 which was published in the *Official Journal of the European Communities* on 29 October 1991.
- 7 FAS states that its action for annulment of Decision 91/547 was brought on the basis both of Article 33 of the ECSC Treaty and of Article 173 of the EEC Treaty since the contested decision is somewhat ambiguous as regards the question of whether its implementation falls under the provisions of the ECSC Treaty or those of the EEC Treaty.
- 8 By a document lodged at the Court Registry on 16 June 1992 the Commission raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure based in substance on the late submission of the application.
- 9 In its observations on that objection the applicant put forward several pleas in law alleging a breach of the principles of the protection of legitimate expectation and

the rights of the defence, that it was unaware both of the contested decision and of the procedure which preceded it and that the decision was a nullity.

- 10 The applicant thus alleges primarily that it was legitimately entitled to assume that the aid in question was lawful and that as sole recipient of the aid it ought to have received individual notification of Decision 91/547 as well as of the communication which appeared in the Official Journal of 7 February 1991 since in that respect it could not be expected to check and verify all the texts published in the Official Journal. It emphasizes that, whilst it was not guilty of any negligence, it had no opportunity during the administrative procedure to submit its observations and that it was only on 16 January 1992 that the Autonomous Region of Sardinia informed it of the existence of the Commission's decision and required it to make reimbursement. The applicant states that it had received a copy of Decision 91/547 from the Italian authorities only by letter of 23 March 1992 and at its own request. Since it was unaware of the complaints which the Commission had made to the Italian authorities it was only on that date that it was able to discover precisely the content of the decision and accordingly exercise its right of action. The applicant adds that the copy of the decision sent to it, in contrast to the published decision, made no mention of the 'ECSC'. It cites the judgment of the Court of First Instance in Joined Cases T-79, T-84, T-85, T-86, T-89, T-91, T-92, T-94, T-96, T-98, T-102 and T-104/89 *BASF and Others v Commission* [1992] ECR II-315 and accordingly requests the Court to order the Commission to produce the original decision. Finally the applicant alleges that the breach of the principles of the protection of legitimate expectation and the rights of the defence makes the contested decision a nullity and that therefore the action is not subject to the legal time-limits.
- 11 The applicant alleges, in the alternative, that the circumstances referred to above amount as a whole to a case of *force majeure* or unforeseeable circumstances within the meaning of Article 39 of the Statute of the Court of Justice of the ECSC.
- 12 Under Article 92(1) of the Rules of Procedure, where an action is manifestly inadmissible, the Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action. In view of the facts of this case the Court has decided to apply those provisions.

- 13 First of all, it must be borne in mind in relation to the arguments put forward by the applicant with regard to breach of the principle of the protection of legitimate expectation and the alleged nullity of the contested measure, that a diligent businessman must assure himself that aid is compatible with Community law (Case C-5/89 *Commission v Germany* [1990] ECR I-3437) and that in any event there are no facts in the documents which allow the contested decision to be regarded as a nullity.
- 14 Next it must be pointed out in relation to the late submission of the application, referred to by the Commission, that the contested decision is based on the ECSC Treaty and that the rules of that Treaty are therefore applicable in this case.
- 15 According to the third paragraph of Article 33 of the ECSC Treaty, proceedings for annulment of a Commission decision must be instituted within one month of its notification or publication. Since the contested decision was published in the Official Journal on 29 October 1991, it is common ground that the action was brought well beyond that time-limit.
- 16 The applicant does not challenge the validity of the time-limits prescribed by the Treaty for bringing actions but nevertheless claims that in this case the period did not begin to run from the date of publication of the contested decision since the latter ought to have been notified to it as the sole recipient of the aid in question. In the absence of such notification the period could not begin to run in this case until the date when the applicant had precise knowledge of the content and grounds of the decision.
- 17 As regards the applicant's argument based on the absence of notification of the contested decision, it must be stated that, in accordance with the system provided for by the ECSC Treaty and the aforementioned Commission Decision 322/89, the addressee of the decision was the Italian Republic whose responsibility it was to take the necessary steps to comply with it. There is no provision for any individual notification of such a decision to the undertakings concerned.

- 18 It is not, however, necessary to decide whether, in the circumstances of this case, the contested decision ought to have been notified to the applicant, since it must be remembered that according to the case-law of the Court it is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period (see Case 236/86 *Dillinger Hüttenwerke v Commission* [1988] ECR 3761, paragraph 14, and Case C-180/88 *Wirtschaftsvereinigung Eisen-und Stahlindustrie v Commission* [1990] ECR I-4413, paragraphs 22, 23 and 24). It is common ground that the applicant had knowledge of the existence of the contested decision at the latest when it received the abovementioned letter of 16 January 1992 from the Sardinian authorities. It is apparent from the documents before the Court that that letter reached it on 18 January 1992.
- 19 It is also apparent from the documents that it was only on 18 March 1992, namely two months after it had knowledge of the existence of the decision, that the applicant applied to the Sardinian authorities for the whole text, whereas it had already on 10 March 1992 instructed its lawyers to challenge that decision before the Court. It follows that a reasonable period for requesting the whole text of the contested decision was in the circumstances of this case widely exceeded and that the initiation of the action was in any event out of time.
- 20 As regards the plea of *force majeure* or unforeseeable circumstances, it must be remembered that apart from special cases in specific areas in which it is used, the concept of *force majeure* requires basically abnormal difficulties, independent of the will of the person concerned and apparently inevitable even if all due care is taken (Case 284/82 *Busseni v Commission* [1984] ECR 557). None of the circumstances cited by the applicant is capable of constituting such a case of *force majeure* or unforeseeable circumstances.
- 21 It follows from all the foregoing considerations that the application must be dismissed as manifestly inadmissible.

Costs

- 22 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby orders:

- 1. The application is dismissed as manifestly inadmissible.**
- 2. The applicant shall pay the costs.**

Luxembourg, 5 March 1993.

J.-G. Giraud

O. Due

Registrar

President