JUDGMENT OF THE COURT (FIFTH CHAMBER)
19 OCTOBER 1983 [1]

Union Sidérurgique du Nord et de l'Est de la France (Usinor) v Commission of the European Communities

(ECSC — Exceeding quota — Fine)

Case 265/82

1. *Objection of illegality — Measures against which an objection of illegality may be raised — Individual decisions — Excluded*
(ECSC Treaty, Art. 36, third para.)

2. *ECSC — Production — System of steel production quotas — General Decision No 1831/81 — Adjustment of quotas — Purpose and detailed rules*
(General Decision No 1831/81/ECSC, Art. 10)

1. An applicant cannot, in an application for a declaration that an individual decision is void, raise an objection of illegality relating to another individual decision addressed to him which has become final.

2. Since the aim of Article 10 of general Decision No 1831/81/ECSC, which permits the adjustment of steel production quotas, is to permit iron and steel undertakings to produce certain steels for the production of small tubes without running the risk of exceeding their quotas and without being compelled to reduce production intended for processing into other finished products, and since checks to ensure that the conditions of Article 10 are met and the allocation of additional quotas necessarily take place after completion of the production in question, the adjustment of the quota of an undertaking which has been able to demonstrate that its production was used in accordance with the requirements of Article 10 must be granted for the quarter in which the steel was produced, regardless of the quarter in which it was delivered.

In Case 265/82

UNION SIDÉRURGIQUE DU NORD ET DE L'EST DE LA FRANCE (USINOR), represented by L. Funck-Brentano of the Paris Bar, with an address for

1 — Language of the Case: French.

service in Luxembourg at the Chambers of Marlyse Neuen-Kauffman, 21 Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Étienne Lasnet, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the decision of the Commission of 13 August 1982 concerning a fine imposed pursuant to Article 58 of the ECSC Treaty is void,

THE COURT (Fifth Chamber),

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

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

On 24 June 1981 the Commission adopted Decision No 1813/81/ECSC 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).

Article 10 of that decision allows for the adjustment of production quotas for

products in Category Ia intended for the production of small tubes. According to the recitals in the preamble to the decision:

"... In view of the poor market situation, it has proved necessary to include hot-rolled wide strip and strip steel for the manufacture of small welded tubes in the quota system.

Since the latter category also covers certain kinds of tube employed mainly in the energy sector which are in active demand and which, for statistical purposes, are difficult to distinguish from any other small welded tube, the quotas for undertakings will have to be adjusted at their request and on presentation of supporting documents, in order to allow production of such tubes to proceed."

Article 10 of Decision No 1831/81 provides that:

"With regard to products of Category Ia which are used in the form of hot-rolled products for the production in the Community of welded tubes with a diameter not larger than 406.4 mm, the Commission shall, at the undertaking's request accompanied by proof of use for such a purpose, adjust the quota and authorize the relevant deliveries."

The Commission fixed the applicant's quota for the third quarter of 1981, pursuant to Decision No 1831/81, by letter of 29 July 1981. On 22 September 1981 the applicant requested an adjustment of that quota under Article 10. By decision of 23 December 1981 the Commission adjusted the applicant's production quota for products in Category Ia for the third quarter of 1981, increasing the quota by 14 132 tonnes.

The applicant did not bring an action to challenge that decision.

Subsequently, the Commission established that Usinor had exceeded by 8 556 tonnes its production quota for the third quarter of 1981 in respect of the products in the above-mentioned category. After giving the applicant an opportunity to submit its written observations and hearing its representatives, the Commission imposed on the applicant by decision of 13 August 1982 a fine of FF 4 215 404 for exceeding the quota.

By application lodged at the Court Registry on 27 September 1982 the applicant challenged that decision in an action in which the Court has unlimited jurisdiction under the second paragraph of Article 36 of the ECSC Treaty. The procedure followed the normal course. 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 enquiry and to assign the case to the Fifth Chamber.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare the decision of the Commission of the European Communities of 13 August 1982 void;

2. In the alternative, reduce the fine imposed to a token amount;

3. 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 — Submisions and arguments of the parties

The *applicant* explains that it produces hot-rolled products which it sells to undertakings for processing into tubes. Hot-rolled products for that purpose are manufactured to order and production is started only upon receipt of the order. In this case, the production quota excess with which it is charged relates to a firm order placed by Corinth Pipeworks SA on 13 July 1981, which was accepted on 20 August 1981. Production for that order took place in September 1981. The order was shipped on 14 and 26 October 1981, dates determined by the ship's timetable.

Contrary to the applicant's expectation, the Commission calculated the adjustment of the quota under Article 10 of Decision No 1831/81 on the basis of the increase in deliveries in the course of one quarter, applying to the production quota the same increase in tonnes as that established in those deliveries. Thus the Commission acted upon an erroneous interpretation of the article in question, ascribing to it a different meaning from that given to it by producers and in particular by the members of Eurofer.

The Commission did not communicate its interpretation of Article 10 until 10 November 1981, in a letter addressed to Eurofer. In view of the long silence on the part of the Commission, the applicant could legitimately believe that that provision would be applied in accordance with the interpretation which it and the members of Eurofer had ascribed to it. By leaving in doubt the conditions of interpretation and application of Article 10 of the decision the Commission infringed the principle of legal certainty.

Article 10 provides that the Commission shall "at the undertaking's request accompanied by proof of use (of the product) ... adjust the quota ...". The decision does not state what is meant by "use" and also does not state whether the Commission is permitted to adjust the production quota, the delivery quota or both. Nowhere does the text state that the production quota must be adjusted by reference to the deliveries effected over the same quarter. In the absence of any provision in the text, the applicant understood that the additions to the quota would be determined on the basis of the orders appearing in the order book, without the relevant deliveries necessarily having to be effected within the quarter concerned.

The Commission's interpretation is arbitrary and unforeseeable. The Commission justifies its interpretation on the basis that the products in question were exclusively intended for producers of tubes within the Community and the production tonnages necessarily coincided with the delivery tonnages. That is correct after a certain period of time, but is not necessarily correct within one quarter.

The Commission's interpretation is in practice wholly unrealistic. In a group such as the applicant's, seven different factories are involved in the production of small tubes and it is not possible to ensure on the date fixed for the end of a quarter the parity assumed by the Commission between production and deliveries.

Furthermore, the method of application adopted by the Commission creates discrimination between producers which have effected deliveries from products in stock or from other sources and whose production quota is thus adjusted on the basis of those deliveries and those which, like the applicant, produce only to order.

The Commission's interpretation and application of Article 10 of Decision No 1831/81 are therefore unlawful and the individual decision of 13 August 1982 must be declared void.

The Commission's decision is also contrary to the principle of proportionality. The use of the production of the third quarter of 1981 was guaranteed by firm orders accepted during that quarter. The excess of production over deliveries in that quarter was compensated for by an equivalent reduction in production during the fourth quarter. The fact that production in the fourth quarter remained below the quota granted in the same amount as the alleged excess proves that the excess for which a fine was imposed constituted a purely formal infringement. The Commission's decision must be declared void on the ground of infringement of the principle of proportionality or, in the alternative, should be revised in view of the purely formal nature of the infringement and the fine reduced to a token amount.

The *Commission* takes the view that the application in fact challenges the legality of the decision of 23 December 1981 by which the Commission decided to adjust the applicant's production quota. Since the applicant did not institute proceedings contesting that decision within the prescribed period, the legality of the decision can no longer be challenged. Nor can the applicant rely upon the third paragraph of Article 36 of the Treaty, since that provision merely permits the applicant to contest the legality of general decisions and recommendations and not the legality of decisions and recommendations which are addressed to it.

In the alternative, the Commission contends that the applicant's claim that its application and interpretation of Article 10 were erroneous is unfounded. The Commission points out that it is necessary to be strict as regards proof of the use of a product in Category Ia for the manufacture of small tubes. Calculation of the adjustment of the production quotas must be based on actual deliveries and not on orders. The delivery document is the means of proof closest to use and the least uncertain. By contrast, the order is an unreliable and uncertain test. An order precedes production, may cover two or more quarters and may even be wholly or partially amended during that time.

Again, during rolling, the intended use (for tubes) may be altered to a different type of use. Undertakings of the size of Usinor are sufficiently flexible to be able to adjust themselves to the provision contained in Article 10 and can, by reason of the large quantities which they produce, ensure that production equals deliveries.

The Commission considers that it applied Article 10 in such a way as to enable it to operate as effectively as possible. Its interpretation was in no way incorrect, arbitrary or erroneous. The other iron and steel undertakings which are members of Eurofer, apart from Usinor,

managed to adapt their production to the level of actual deliveries.

The Commission considers that Usinor applied and continued to apply its own interpretation of Article 10 at its own risk. The consequence of that attitude was that the quota was exceeded and a penalty must be imposed in respect of such excess. A delay on the part of the Commission in communicating its position on Article 10 could not in any event justify the imprudent attitude of the applicant. Furthermore, the Commission disputes that there was any such delay. There were exchanges on several occasions on that matter between the Commission and the representatives of Eurofer, of which Usinor forms part, and the letter of 10 November 1981 merely confirmed and formalized those contacts.

The Commission disputes that the manner in which it applied Article 10 resulted in discrimination between producers. The argument relating to stocks seems to arise out of a misunderstanding.

The Commission vigorously rejects the applicant's argument that it imposed in respect of a purely formal infringement a fine equal to that which would be payable in the case of a real quota excess. In an objective system such as the system of quotas, there can be no question of regarding infringements as purely "formal". A quota is either exceeded or not exceeded. The basic principle of quotas is the very fact that they are based on quarters. The applicant's statement that "the time-lag which gave rise to the decision imposing a fine did not result in any benefit to the applicant and did not cause any damage to the Community" is irrelevant.

The Commission applied the general rule whereby a quota excess must be penalized by means of a fine of 75 ECU for each tonne in excess of the quota. That general rule constitutes the very principle on which the system is based. The use of the word "generally" is meant to allow rather for individual cases such as a declaration of bankruptcy by the undertaking which exceeded its quota. Usinor's interpretation of Article 10 in that regard cannot constitute grounds for relaxing the penalty.

The *applicant* in its reply challenges the objection of inadmissibility raised by the Commission. The facts of the case are quite different from those on which the judgment of 31 March 1965 in Case 21/64 *(Macchiorlati Dalmas e Figli* v *High Authority*, [1965] ECR 175) were based. In any event, the Court has unlimited jurisdiction in this application, which is directed primarily against the individual decision of 13 August 1982. It is only incidentally that the applicant challenges the legality of certain provisions of general Decision No 1831/81 as they are interpreted by the Commission. In that regard, its application is admissible under the third paragraph of Article 36 of the Treaty, because the decision of 13 August 1982 is based on that general decision of which it is an application (see the citation and the second recital in the preamble to, and Article 1 of, the decision of 13 August 1982). There is a necessary connection between the two decisions. On the other hand, the applicant does not challenge the decision of 23 December 1981.

On the merits, the applicant disputes the Commission's argument that production quotas for primary products can be regulated only by reference to deliveries.

Unlike quotas for other products, those quotas are adjusted *ex post facto*, on the basis of the declarations made by the undertakings. The applicant considers that the criterion of deliveries applied by the Commission is contrary to the letter of Decision No 1831/81 and is not the most effective criterion, albeit it is the most restrictive. In its view, the criterion of sale and the requirement of documents proving use provides the Commission with a surer guarantee that the product in Category Ia manufactured in the course of a quarter was actually used by the purchaser for the manufacture of small welded tubes. The Commission's argument that the purpose designated during rolling may be changed to a different use also applies in the case of delivery. Therefore it is pointless to require that production and delivery should correspond exactly by the end of each quarter.

The applicant contests the Commission's statement that an undertaking of its size is sufficiently flexible to be able to adjust itself to the provision contained in Article 10. It provides a detailed explanation of that point.

The applicant also rejects the Commission's argument that it applied its own interpretation of Article 10 at its own risk. The Commission's argument that the applicant ought to have applied the original quota until its quota had been adjusted deprives Article 10 of Decision No 1831/81 of any meaning, since it would mean that, in the absence of a clear statement on the part of the Commission, undertakings must abstain from producing Category Ia products in excess of the original quota in spite of demand on the market. The applicant disputes in particular that the undertakings which were members of Eurofer had an opportunity of discovering the Commission's position on the interpretation and application of Article 10 before the expiry of the third quarter of 1981. Usinor was counting on two different additional quotas, one for production and the other for deliveries. The applicant explains its arguments on discrimination between producers carrying stocks and those producing to order.

The applicant asks the Court to take into account the circumstances of the case in fixing the fine. The Court should not accept the Commission's interpretation of the therm "generally" in Article 12 of Decision No 1831/81 but should exercise its power of review and declare void or amend the decision, ascertaining whether there are aggravating or extenuating circumstances.

In its rejoinder, the *Commission* returns to its objection of inadmissibility. It disputes the applicant's argument and insists upon the need to observe the strict time-limit for instituting proceedings to have a decision declared void.

On the merits, the Commission points out that Article 10 relaxes the rules on quotas and is not to be applied automatically. One of the essential conditions is the provision of proof that the products were used for the production of small tubes. The criterion of actual delivery at least ensures that checks are effective. By making deliveries out of its stocks, Usinor benefited from the

possibility of effecting deliveries in the last quarter of 1981 which were larger than its production tonnages and therefore it cannot claim discrimination. The Commission denies that it was guilty of any delay in its decision to adjust the quotas. It points out that none of the other 21 undertaking which benefited from the application of Article 10 questioned the use of the criterion of deliveries actually made for the adjustment of their quotas. Finally, it refers to the importance of a strict and automatic application of the fines applicable for exceeding quotas.

IV — Oral procedure

At the sitting on 22 June 1983 oral argument was presented by L. Funck-Brentano, for Usinor, and E. Lasnet, for the Commission.

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

Decision

1 By an application lodged at the Court Registry on 27 September 1982 Union Sidérurgique du Nord et de l'Est de la France (Usinor) appealed under the second paragraph of Article 36 of the ECSC Treaty, which gives the Court unlimited jurisdiction, against the Commission's decision of 13 August 1982 imposing upon the applicant a fine of FF 4 215 404 for exceeding its production quota for the third quarter of 1981.

2 The dispute between the parties resulted from different views as to the interpretation of Article 10 of Decision No 1831/81/ECSC of 24 June 1981, a general decision "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). Article 10 of that decision allows for adjustments of production quotas for products in Category Ia intended for the manufacture of small tubes. According to the recitals in the preamble to that decision, those tubes are in active demand, mainly in the energy sector. For statistical purposes they are, however, difficult to distinguish from any other small welded tube. Consequently the quotas for undertakings must be adjusted at their request and on presentation of supporting documents, in order to allow production of such tubes to proceed. On the basis of those recitals, Article 10 provides that:

"With regard to products of Category Ia which are used in the form of hot-rolled products for the production in the Community of welded tubes with a diameter not larger than 406.4 mm, the Commission shall, at the undertaking's request accompanied by proof of use for such a purpose, adjust the quota and authorize the relevant deliveries."

3 The applicant requested the benefit of that provision in order to meet an order from Corinth Pipeworks SA, received on 13 July 1981 and accepted on 20 August 1981. The rolled products ordered were produced in September 1981, that is to say during the third quarter of 1981. They were shipped on 14 and 26 October 1981, during the fourth quarter of 1981, on dates determined by the ship's timetable.

4 The Commission did not deny that that production was used for purposes which entitled the applicant to an adjustment of its quota, but it nevertheless considered that the adjustment should be made by increasing the production quota for the quarter in which delivery, and not production, took place.

5 Consequently, the applicant's quota for the third quarter was increased by decision of 23 December 1981 to 671 852 tonnes for products of Category Ia, taking into account solely the deliveries effected during that quarter. The applicant did not institute proceedings before the Court challenging that decision within the prescribed period. Since the applicant's production amounted to 685 950 tonnes — an excess of 8 556 tonnes taking into account a tolerance of 3 % — the Commission adopted the contested decision imposing upon the applicant a fine calculated in accordance with Article 12 of Decision No 1831/81/ECSC by multiplying the number of tonnes of excess by 75 ECU.

6 The applicant claims that the Commission's decision of 13 August 1982 should be declared void in so far as it declares in Article 1 that the applicant exceeded its production quota by 8 556 tonnes for products in Category Ia in the third quarter of 1981 and therefore imposes in Article 2 a fine of 641 700 ECU (FF 4 215 404).

7 In support of its submissions challenging Article 1 of the contested decision, the applicant does not deny that the quota was actually exceeded but relies upon arguments which in effect challenge the legality of the decision of 23 December 1981 by which the Commission fixed its quota for the third quarter of 1981. That decision became final when it was not contested within the period prescribed by the Treaty. It is well-established case-law that an applicant cannot, in an application for a declaration that an individual decision is void, raise an objection of illegality relating to another individual decision addressed to him which has become final. That being so, the applicant cannot effectively rely upon the illegality of the above-mentioned Commission decision which fixed its quota for the third quarter of 1981, and the submissions referred to above must be rejected.

8 On the other hand, as regards the submissions challenging Article 2 of the contested decision it is common ground that if the Commission had included the production for the order from Corinth Pipeworks SA in adjusting the quota for the third quarter of 1981, the applicant's production would not have exceeded the quota imposed.

9 The Commission, however, considered that the adjustment of quotas had to be given for the quarter in which delivery, not production, of the rolled products occurred.

10 It should be observed in that regard that the aim of Article 10 of Decision No 1831/81/ECSC is to permit iron and steel undertakings to produce certain steels for the production of small tubes without running the risk of exceeding their quotas and without being compelled to reduce production intended for processing into other finished products. Checks to ensure that the conditions of Article 10 are met and the allocation of additional quotas necessarily take place after completion of the production in question. Thus the undertaking which produces more than its original quota must be able to prove subsequently that its additional production was actually used for the purposes laid down in Article 10.

11 It is thus clear that the adjustment to the quota of an undertaking which has been able to demonstrate that its production was used in accordance with the requirements of Article 10 as cited above must be granted for the quarter in which the rolled products were produced, regardless of the quarter in which the rolled products were produced, regardless of the quarter in which they were delivered. The Commission's interpretation, which seeks to adjust quotas for the quarter of delivery, in fact produces results which are incompatible with the aims of Article 10, as is shown in particular by the circumstances of this case. Thus production which is effected at the end of a quarter and which cannot be delivered before the beginning of the following quarter cannot be regarded — in the event of adjustment — as exceeding the quota purely because the undertaking has exhausted its original quota.

12 Equally mistaken is the argument put forward by the Commission at the hearing to the effect that an undertaking in the applicant's situation should not declare the excess production in one quarter until the following quarter. Such a solution amounts in practice to inciting the undertaking to submit to the Commission, in breach of the relevant provisions, inaccurate declarations, which suffices to show that the interpretation suggested by the Commission is manifestly impracticable.

13 In the circumstances, the Court is of the opinion that the infringement of which the applicant is accused on the ground that it exceeded the quota fixed for the third quarter is purely formal and that the Court should, in the exercise of the unlimited jurisdiction conferred upon it by the second paragraph of Article 36 of the ECSC Treaty, annul the fine imposed by the Commission.

14 At the sitting, Counsel for the applicant requested the reimbursement of the expenses incurred by the applicant in order to furnish the Commission with a bank guarantee to secure the suspension of the fine. The request was out of time, however, and the Commission did not have an opportunity of effectively formulating its defence in that regard. That claim must consequently be dismissed.

Costs

15 According to Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has in the main been unsuccessful in its arguments, it should be ordered to pay the whole of the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby declares:

1. **Article 2 of the Commission's decision of 13 August 1982 imposing a fine of 641 700 ECU on the applicant is void;**

2. **The remainder of the application is dismissed;**

3. **The Commission is ordered to pay the costs.**

Galmot Mackenzie Stuart

Due Everling Kakouris

Delivered in open court in Luxembourg on 19 October 1983.

J. A. Pompe
Deputy Registrar

Y. Galmot
President of the Fifth Chamber