JUDGMENT OF THE COURT (FIRST CHAMBER)
11 OCTOBER 1984 [1]

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

(Steel — Production quotas)

Case 103/83

ECSC — Production — Steel production quota system — Undertakings referred to — Group of concentrated undertakings — Concept — Reference to Article 66 of the Treaty — Whether permissible — Entity to which quotas to be allocated — Undertaking which directs group's production activities

(ECSC Treaty, Arts. 58, 66 and 80; General Decision No 1696/82, Art. 2 (4))

The Commission has not exceeded the power of assessment granted to it by Article 58 of the ECSC Treaty by deciding, for practical reasons, to choose, as the person to whom quotas were to be allocated, the undertaking which directs the production activities of a group of undertakings, such a method permitting the undertaking moreover to divide up the quotas within the group in a way which most closely corresponds to the needs of efficient management of production. By thus choosing to allocate quotas under Decision No 1696/82 to the group of concentrated undertakings within the meaning of Article 66 of the ECSC Treaty, the Commission was in no sense acting in a way which was contrary to the definition of an undertaking laid down in Article 80 of the ECSC Treaty, as it has been interpreted, in particular, in the Court's case-law, since neither the distinct legal personality of the undertakings in the group nor their capacity to bring actions individually in regard to matters which concern them, is affected by such a decision.

In Case 103/83

UNION SIDÉRURGIQUE DU NORD ET DE L'EST DE LA FRANCE (USINOR), represented by Lise Funck-Brentano, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Marlyse Neuen-Kauffman, 21 Rue Philippe-II,

applicant,

1 — Language of the Case: French.

V

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Frank Benyon, a member of its Legal Department, 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 Commission's refusal to increase the applicant's quota in respect of products in Category V and Category Id for the second quarter of 1983 is void,

THE COURT (First Chamber)

composed of: Lord Mackenzie Stuart, President, G. Bosco (President of Chamber) and T. Koopmans, Judge,

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

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

Pursuant to Article 58 of the ECSC Treaty, the Commission, by Decision No 1696/82/ECSC of 30 June 1982 (Official Journal L 191, p. 1), most recently amended by Decision No 87/83/ECSC of 12 January 1983 (Official Journal L 13, p. 9), extended the system of monitoring and the new system of production quotas for certain products of undertakings in the Community steel industry.

By Decision No 379/83/ECSC of 16 February 1983 (Official Journal L 45, p. 19), the Commission fixed the rates of abatement for the second quarter of 1983 and notified the applicant, by a letter of 28 February 1983, of the quotas

allocated to its group of undertakings for the second quarter of 1983.

By Decision No 950/83/ECSC of 20 April 1983 (Official Journal L 104, p. 19), the Commission amended the rates of abatement for the second quarter of 1983. Consequently, the Commission informed the applicant of the new production and delivery quotas for the second quarter of 1983.

The applicant brought an action against that decision by an application received at the Court Registry on 3 June 1983. The written procedure followed the normal course. Upon hearing the report of the Judge Rapporteur and the views of the Advocate General, the Court decided to assign the case to the First Chamber without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Commission decision of 27 April 1983 should be declared void:

1. Inasmuch as it notifies Usinor of quotas for the products in Category V whereas such notification should have been addressed to another undertaking;

2. Inasmuch as, even if the Commission considered that the notification should have been addressed to the applicant, it should have treated the company Alpa as a separate undertaking for the purposes of Article 80 of the ECSC Treaty and should have adjusted its quotas for the products in Category V pursuant to the provisions of the third indent of Article 14 of Decision No 1696/82/ECSC; and

3. Inasmuch as the Commission has failed to fulfil its obligations by fixing at too low a level the positive rates of abatement applied to products in Category Id in general Decision No 950/83 and by allocating to the applicant, pursuant to that general decision, quotas which are insufficient for it to meet the demand, which has considerably increased owing to profound changes which have occurred in the market.

The *Commission* contends that the Court should:

Dismiss as unfounded the application for a declaration that the decision is void;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — Products in Category V

The products in Category V in question are reinforcing bars produced by a subsidiary of the applicant, Alpa. According to the applicant, the Commission wrongly notified Usinor of quotas intended for Alpa, which constitutes a distinct legal person within the meaning of Article 80 of the ECSC Treaty and an independent economic unit within the Usinor group. That separate company within the Usinor group is the only undertaking in the group which manufactures reinforcing bars. By a letter of 23 February 1983, Alpa asked the Commission to be allowed to benefit from the adjustment provided for in Article 14 of Decision No 1696/82 for the first quarter of 1983. No reply was received to that letter. Alpa made the same request for the second quarter of 1983 in a letter dated 26 May 1983.

Article 14 of Decision No 1696/82, in the form in which it was in force in 1983, provides for the possibility of an adjustment of quotas in the case of Category V if:

Total production of the products listed in Article 1 did not exceed 700 000 tonnes in 1981;

Production of categories IV, V and VI comprised at least 90% of the total production of the undertaking in 1981;

Production of Category V represented at least 30% of the production of Categories IV, V and VI in 1981; and

The abatement rate for Category V exceeded 40%.

Alpa, which produces only reinforcing bars, meets the conditions laid down by the aforementioned Article 14. The applicant, on the other hand, cannot take advantage of that possibility of obtaining an adjustment because its total production in 1981 of the products referred to in Article 1 of the decision is greater than the limit of 700 000 tonnes.

Article 14 is intended to help small undertakings and undertakings specializing in products in Categories IV, V and VI, to cope with the exceptional difficulties they are likely to face because of the high rates of abatament laid down for those products. The rates of abatement for products in Category V reached 43% and 50% during the second quarter of 1983. Alpa, the only company in the Usinor group established in the Paris region and the only company in the group manufacturing reinforcing bars, was obliged to lay off staff for at least four weeks during the first two quarters of 1983. Those employees cannot be transferred to another undertaking in the group and the undertaking has since been operating at a loss.

Alpa meets all the conditions laid down in Article 14. Apart from its specialized production, Alpa is a legal person. It has its own articles of association, files its own accounts, pays value-added tax itself to the French tax authorities, sells directly on the market to competitors of the Usinor group amongst others, and decides its own investment programme in complete independence. In French Law, it is an undertaking in both the legal and the economic senses of the term.

The same is true as regards Community law, in which the concept of an undertaking is defined by Article 80 of the ECSC Treaty. The applicant relies on the definition of an undertaking and of the difference between an undertaking and the group to which it belongs, laid down by the Court in its judgments of 22 March 1961 (Joined Cases 42 and 52/59 *SNUPAT* v *High Authority* [1961] ECR 53) and of 13 July 1962 (Joined Cases 17 and 20/61 *Klöckner and Hoesch* v *High Authority* [1962] ECR 325). The Court decided that the concept of an undertaking for the purpose of the Treaty may be identified with that of a natural or legal person. ALPA should therefore be regarded as an independent undertaking on account of the total absence of economic or technical links with the Usinor group.

The applicant contests the legality of Article 2 (4) of Decision No 1696/82 according to which a group of undertakings which are concentrated within the meaning of Article 66 of the ECSC Treaty are to be regarded as a single undertaking. The Commission cannot apply the definition of a group of undertakings, laid down by the Treaty in the context of the rules governing mergers and concentrations, to situations other than those referred to in Article 66 and thereby ignore the provisions of the Treaty and the case-law of the Court. In that connection, the Court emphasized,

in the aforementioned *SNUPAT* judgment, that it could be accepted that several distinct companies might constitute a single undertaking within the meaning of Article 80 of the Treaty only if the Treaty contained an express provision to that effect. In the absence of such a provision it cannot be presumed that two separate and distinct companies can constitute a single undertaking for the purposes of the Treaty.

Since the undertakings retain their legal personality, they have, according to the applicant, rights and obligations under Community law, including the right to seek an adjustment of the references for Category V (reinforcing bars) under the third indent of Article 14 of Decision No 1696/82. The refusal to regard Alpa as an undertaking within the meaning of Article 80 amounts to discrimination as between Alpa, the subsidiary of Usinor, and the other single-product undertakings, which are entitled to an adjustment.

The *Commission* considers that it is not contested that Alpa is concentrated with the Usinor group within the meaning of Article 66 of the Treaty. The Commission accepts that Alpa is an undertaking within the meaning of Article 80 of the Treaty.

The question is whether or not the provision in Article 2 (4) that "for the purposes of this decision, any group of concentrated undertakings ... shall be regarded as a single undertaking ...", is unlawful.

The Commission points out that the Treaty gives the Commission wide discretionary powers in regard to the establishment of a system of production quotas. The Commission must exercise the powers granted to it by Article 58 of the ECSC Treaty in an objective and non-discriminatory manner. For the purposes of the proper implementation of the quota system, the criterion whereby a group of concentrated undertakings within the meaning of Article 66 of the Treaty is also the body subject to the quota system is objective and appropriate.

A concentration of undertakings is identified by the fact that one or more undertakings are under the control of another undertaking. Control implies the possibility of influencing the decisions of another undertaking in industrial and commercial matters. It is necessary, in order to ensure that the system of quotas is effective, that the person who is in a position to determine the undertaking's production operations be the one who is subject to the system.

Laying down production quotas for each individual undertaking would call in question the rights of the undertaking which has obtained control of the concentrated undertakings and would thus breach the principle laid down in Article 66 of the ECSC Treaty that concentrations of undertakings are lawful. In fact, fixing a single production quota for the whole of the group makes the system much more flexible. The production effected during the reference period is added up for all the undertakings which compose the group. The group may however share out the production quotas so fixed as it sees fit between the various undertakings. The group thus has a considerable advantage compared to an individual undertaking which can only modify or increase, by exchange or by purchase, the quotas which have been allocated to it. Decision No 1696/82 thus takes account of an essential objective which the establishment of a concentration between undertakings was designed to meet,

namely, to bring about a rationalization of operations by means of specialization within the group.

A group of concentrated undertakings is no different from an undertaking which, even though constituting a single legal person, has several centres of production. A system established by the public authorities must be based on the reality of the economic structures and operations. The quota system is intended to lay down the structure and volume of future production in the light of the structure and volume of the production which has taken place in the past. For a group of concentrated undertakings within the meaning of Article 66 of the ECSC Treaty, the production recorded during the reference period is the result of decisions taken in the context of the unity of the consortium and determined by the interests of that consortium.

The Commission points out that in spite of the fact that Alpa contributed about 55% of the reference production taken into account in connection with the first system of quotas, whilst the other undertakings in the Usinor group contributed 45%, Alpa contributed 93% of the production under the system established by Decision No 1696/82, and the Usinor group's annual report for 1982 refers to the complete transfer of the manufacture of reinforcing bars within the group to Alpa. The Usinor group was thus able to take advantage of the considerable flexibility of the system by concentrating the production of reinforcing bars on that subsidiary. Moreover, it cannot be said that Alpa has experienced exceptional difficulties when the annual report shows that in 1982 that subsidiary obtained good results, which were better than those of earlier years. The quotas in respect of Category V for the second quarter of 1983, 141 129 tonnes, give a utilization rate of 65.8% compared to Alpa's annual capacity of 250 000 tonnes, that is, 62 500 tonnes per quarter.

The Commission considers that Usinor, regard being had to its earlier conduct, should not be allowed to contest its quotas. Usinor supplied production figures for the entire group, including Alpa, it took advantage of the flexibility of the group quota, to the advantage of Alpa, it never cast any doubt on the group quotas over a period of 10 quarters, and Alpa did not ask for a separate quota. Usinor further sought and was granted adjustments of its quotas as a group and took advantage of the tolerances permitted to multi-product producers in calculating its excesses and possible fines imposed for failure to have regard to the quotas laid down by the Commission.

In its reply, the *applicant* emphasizes that it contests the third paragraph of Article 14 to the extent to which it discriminates between undertakings according to their size, which, it contends, is contrary to Article 4 (d), a fundamental provision of the Treaty. The extension of the definition of a group of undertakings, laid down by the Treaty in the context of the rules on mergers and concentrations to situations other than those referred to in Article 66 leads to arbitrary results and discriminates against certain undertakings without any real economic justification other than the desire to unify the system of allocating quotas.

The Commission attempts to demonstrate that the criterion applied by Article 2 (4) of Decision No 1696/82 is objective, in the sense that a group of undertakings has greater flexibility in sharing out the quotas allocated as

between the undertakings in the group and that this justifies the allocation of comprehensive quotas to the exclusion of individual quotas for certain undertakings. The applicant considers that that may well be true in certain cases, but is false in others. In the case of the applicant, the flexibility referred to by the Commission does not exist.

The parent company, Usinor, has progressively ceased production of reinforcing bars at the seven production centres distributed among its former plants and has concentrated the group's activities in Category V on Alpa. Since none of the applicant's other subsidiaries produce reinforcing bars, it does not have any room for manoeuvre to transfer either quotas in respect of Category V or Alpa's staff. Contrary to what the Commission appears to believe, Alpa is totally independent of the parent company as regards obtaining supplies of scrap, and selling is carried on by Alpa in complete independence, the effect of which is that the company is in the same situation, in economic terms, as an undertaking which has not been integrated. The applicant draws attention to the fact that Alpa produces only one product and that its plant will not enable it to produce anything other than reinforcing bars.

The effect of the system established by the Commission is that two undertakings working under similar conditions are treated differently. The fact that adjustments are granted to small, independent undertakings, and that this possibility is denied to integrated undertakings, operating under the same conditions as an independent undertaking, inevitably entails structural changes in the sector in question. With the help of adjustments to their quotas, the small independent undertakings are able to meet orders which the integrated undertakings cannot meet because their quotas are not sufficient and they are therefore increasing their production to the detriment of that of their competitors. Usinor/Alpa's share of the French market dropped from 27.7% in 1974 to 13.5% in 1982 whilst that of the Italians went from 3.5% in 1974 to 24.2% in 1982.

According to the Court's case-law, the Commission must apply Article 58 of the ECSC Treaty in a way which has no effect on competition, and without according a privileged position to certain undertakings compared to others which are in a similar position on the market. Modernization and restructuring measures should not penalize the undertakings which have effected them but should rather be to their advantage. The rules providing for exceptions to the general system of quotas should be drawn up in the light of the general objectives of the Treaty.

The Court of Justice has accepted the system of quotas calculated in the light of reference production because it considered that it did not alter the structure of the market. "It enables total production to be reduced without altering the positions of the undertakings on the market as between each other" (judgment of 3. 3. 1982, Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749; judgment of 16. 2. 1982, Joined Cases 39, 43, 85 and 88/81 *Halyvourgiki* v *Commission* [1982] ECR 593).

Even though the Court considered that Article 14 of Decision No 2794/80, which provided for an individual exception allowing the Commission, at

the request of the undertaking concerned and for reasons of equity in particularly difficult cases, to modify an undertaking's quota was lawful (judgment of 3. 3. 1982, *Alpha Steel*, cited above) the version of Article 14 which was then in force did not totally exclude the possibility of an adjustment for an entire group of integrated undertakings or for a very large group.

The Commission has deliberately chosen to impose the sacrifices involved in the reduction of aggregate production on a few undertakings to the exclusion of others for no objective reason other than the size of the former.

The applicant considers that the limited use of its capacity creates serious social, commercial and financial difficulties. The loss for the first quarter of 1983 amounted to 7 642 000 francs and was to be 5 766 000 francs for the second quarter of 1983.

The applicant emphasizes that an adjustment of the share allocated to certain undertakings entails a corresponding reduction of the share allocated to others. That distortion of production may be clearly seen in a table annexed to the reply as well as in the published market forecasts and in the allocation of quotas. As a result of the adjustments made by the Commission, Usinor's share of the total quota was reduced from 2.54% of the provisional quota to 2.40% of the definitive quota for the second quarter of 1983. Usinor's share of the total quota in Category V has declined continuously, quarter after quarter, as a result of the allocation of supplementary quotas to competing, non-integrated undertakings, as may be seen from the table in Annex 7. Usinor's share went from 2.8% for the fourth quarter of 1981 to 2.40% for the second quarter of 1983.

If the definitive aggregate quota had been equitably shared out among the undertakings producing reinforcing bars operating under the same conditions, the applicant would have had the benefit of an adjustment so that the reduction in its production in Category V would be closer to the average aggregate reduction for all undertakings based in the ECSC.

In its rejoinder, the *Commission* points out a contradiction which it sees in the applicant's arguments. In its applicaction, the applicant sought to benefit from the third indent of Article 14 of the general decision, No 1696/82. The applicant was not contesting the lawfulness of that article but attempting to demonstrate that Article 2 (4) discriminated as between Alpa and the other single-product undertakings which benefited from the third indent of Article 14.

The Commission contends that, in its reply, Usinor introduced an entirely new submission by claiming that the third indent of Article 14 was unlawful because it excluded undertakings whose production was above a certain level. On page 23 of the reply, it claimed that the individual decision should be declared void because it was based on the third indent of Article 14 of Decision No 1696/82, the lawfulness of which was contested. Since, according to Article 42 (2) of the Rules of Procedure of the Court, no fresh issue may be raised in the course of proceedings, the Commission asks the Court to reject the new submission as inadmissible.

The Commission considers, moreover, that the contested decision was not taken

on the basis of the third indent of Article 14 and that it is not therefore possible for the applicant to raise an objection of illegality in regard to that provision, which does not constitute the basis of the disputed individual decision.

The Commission contests the applicant's argument that Article 2 (4) leads to a noticeable imbalance in the competitive position of the undertakings concerned, and in particular, of Alpa. The very terms of Article 58 allow the Commission to ensure a fair distribution of the burdens which must be borne if those enterprises which are most seriously affected are to be maintained in existence. A system of adjusting quotas, limited to certain undertakings, is an appropriate means to that end. The Court of Justice has accepted that certain modifications of market structures are in no way contrary to Article 58 of the Treaty in so far as it has accepted the legality of provisions providing for adjustments in reference production (see the *Krupp* case [1981] ECR 2489, and *Alpha Steel* [1982] ECR 749).

Nor does the Commission accept that it has applied a purely legal criterion. It is rather Usinor which wishes the Commission to adopt a "purely legal" rule by allocating individual quotas to each undertaking within the meaning of Article 80. If that argument were accepted, the allocation of quotas and the decisions regarding possible adjustments would depend purely on the legal form of the undertaking in question. If Alpa were a separate company, but part of a group, it would receive individual quotas and would be the subject of separate decisions of adjustment. If a unit similar to ALPA were no more than a distinct factory belonging to a single legal unit, it would not be allocated separate quotas.

The Commission also rejects the contention that Usinor, the parent company, does not have the flexibility of management of a group. The Commission cites by way of example the fact that during the fourth quarter of 1981, Usinor took advantage of the group's under-utilization of quotas in Categories Ia and VI, categories covering products not produced by Alpa, to reduce an excess of 2 211 tonnes over the production quota in Category V to only 335 tonnes.

The Commission also points out that the system of quotas is not designed to ensure a profitable level of utilization of the installations of undertakings concerned (judgment of 11. 5. 1983, Case 244/81, *Klöckner-Werke* v *Commission* [1983] ECR 1451, in particular, paragraph 27).

In the alternative, if the Court regards the submission alleging the illegality of the third indent of Article 14 of Decision No 1696/82 as admissible, the Commission considers that it is without foundation.

The Commission first of all analyses the development of the market, the consequences of which were unfavourable to the so-called single-product undertakings manufacturing reinforcing bars from scrap by converting it directly into liquid steel in electrical furnaces. That process does not allow them to manufacture any other steel product.

The Commission contends that the reduction in the rates of abatement, applied to small and medium-sized single-product undertakings by Decision No 533/82, was not discriminatory and was proportionate to the objective of giving all undertakings a chance to survive. The unequal treatment does not constitute discrimination because the situations are not comparable, whether

from the point of view of the size of the undertaking, from that of the structure of production or from that of the effects of the production quota system.

In the Commission's view, if the insertion of Article 14 b in Decision No 1831/81 by Decision No 533/82 is lawful, the same is true, *a fortiori*, of the third indent to Article 14 of Decision No 1696/82 which replaced it and which is itself more restrictive because adjustments are granted only if, after an examination of each individual case, the undertaking has demonstrated the existence of exceptional difficulties, in the light of the new market situation which has developed.

B — Products in Category Id

Two of the applicant's subsidiaries, Laminoirs de Strasbourg and Galvanor, manufacture a new product, monogal, which is covered by Category Ib. That product is a sheet metal which is coated with zinc by hot-dip galvanizing. The zinc is then removed on one side by brushing while the other side remains coated with zinc. Thus, it may be easily welded, drawing may easily be effected and paint adheres better to the sheet.

The product's resistance to corrosion explains why it is being increasingly used in the motor industry.

According to the applicant, there has been a shift in demand from products in Category Ib, cold-rolled sheet, to hot-dip galvanized sheet covered by Category Id, such as monogal.

Usinor's quotas in respect of Category Id were fixed in the light of reference production calculated over 12 months, of which one month was in 1978 and eleven months in 1979, and in respect of the first six months of 1980. Because of the considerable increase in demand, the reference production is not at all adapted to the present level of demand for that product. The applicant enclosed with its application extracts from its correspondence with its customers, who did not understand why their orders could not be met.

By refusing to take account of the profound changes which have taken place in the market for products in Category Id, the Commission has failed to fulfil its obligations. Article 18 of Decision No 1696/82 requires the Commission to carry out the necessary adjustments by general decision "if radical changes occur on the iron and steel market or if the application of this decision encounters any unforeseen difficulties". The considerable shift in demand from uncoated to coated sheet is certainly a "radical change . . . on the . . . market". The Commission was warned of that danger by the industry and was obliged to make sufficient adjustments in the abatement rates to allow producers to meet the increased demand in the market.

Commission Decision No 950/83/ECSC of 20 April 1983 (Official Journal L 104, p. 19) fixing the amended rates of abatement for the second quarter of 1983, is insufficient.

The *Commission* indicates that it took a decision on 8 June 1983 (Decision No 1619/83/ECSC, Official Journal L 159,

p. 56) which inserted the following Article 17a in Decision No 1696/82:

"Where the Commission finds as a result of an application lodged by an undertaking in the course of a quarter that this undertaking can no longer supply its customers with products included in Category Id owing to its low reference production and the consequent quotas and owing to the fact that its customers request supplies of products in Category Id instead of products in Category Ib and/or Ic, the Commission may authorize a partial transfer to Category Id of the production quotas in respect of Category Ib and/or Ic and of the part of these quotas which may be delivered in the common market to the extent that this does not interfere with the working of the system."

The Commission therefore considers that the part of the application dealing with products in Category Id has lost its purpose.

The Commission also considers that the solution proposed by Usinor, namely, an increase in the positive rates of abatement in respect of Category Id, would not be appropriate because it would in fact be tantamount to a substitution of products in Category Id for those in other categories, and in particular, for those in Category Ib.

The Commission also considers that the problem is not a general one and for that reason it provided for adjustments, where justified, undertaking by undertaking.

The *applicant* considers that the possibility of transferring quotas from Categories Ib or Ic or both permitted by Article 17a of Decision No 1696/82 is not of such a nature as to cure the illegality either of Decision No 950/83, or of the individual decision notified to it under that general decision as regards products in Category Id. That is because, first of all, Article 17a was published late and its provisions could not be applied to production for the second quater of 1983 and, secondly, because the provisions of Article 17a are not of such a nature as to solve the problem raised in regard to the system of quotas by the growth of the market for products in Category Id.

As regards the second quarter of 1983, the purport of Article 17a was known, at the earliest, on Monday 20 June, that is to say, 10 days before the end of the second quater of 1983, and at a time at which the applicant had already produced at least 90% of its production quotas for that quarter and when shortage of time made it totally impossible for the applicant, for technical reasons, to avail itself of the possibility of transferring quotas as provided for in that article.

The Commission had been aware for months of the situation on the market for products in Category Id.

The Commission should have carried out the necessary adjustments in good time whereas it in fact did so only at a late stage and incompletely.

The applicant considers that Article 17a penalizes undertakings beyond what is made necessary by the quota system, because of the different abatement rates for quotas in Categories Ib or Ic or both, on the one hand, and for Category Id, on the other. The Commission should have provided for a tonne by tonne transfer of reference quantities from Ib or Ic or both to Id and not a transfer of quotas. Only a transfer of reference production makes it possible to take account fairly of the market structures because the adjustment of the volume of production to demand is carried out by means of the abatement rates.

The applicant gives an example, supported by figures, of the effects of the present system and compares it with the figures which would result from the system which it proposes.

The *Commission* denies that Decision No 1619/83 was adopted at a late stage. Before acting, it had to ascertain whether there was a general problem justifying an adjustment on the basis of Article 18 (1) of the Article 18 (1) of the decision. Usinor's complaints in November 1982 were not sufficient for that purpose.

Study of the market in question was very difficult because the products covered by Category Id are very diverse. That category includes sheet with organic coating for removable partitions, and prepainted sheet for office furniture and household appliances. The consumers and markets for which those products are intended are also very different. Very few statistics giving satisfactory information were available. Moreover, the Commission contacted Usinor by telephone as soon as it had taken its decision.

According to the Commission, there is a close link between products in Category Ib and those in Category Id. The product, though more refined, is basically the same, namely, sheet steel. It is not clear why a motor manufacturer should require two sheets of Category Id steel for the body of the car instead of one sheet of Category Ib steel.

Usinor's theoretical example is completely artificial. The Commission proposes to take a real example. The estimate of total consumption is determined on the basis of discussions with all the interested parties and the abatement rates resulting are therefore determined in an entirely objective fashion. When a motor manufacturer decides to use a hot-dip galvanized sheet rather than an ordinary one, he does not use more steel. The Commission's decision must be regarded as perfectly logical in the sense that it allows a tonne by tonne transfer from one category to the other.

The transfer of reference production proposed by Usinor from Category Ib (abatement rate 30%) to Category Id (positive rate plus 40%) would entail a doubling of the resulting quota (140 tonnes instead of 70 tonnes). Usinor is not seeking to overcome the problem by shifting consumption from one category to another but is rather seeking a considerable increase in its quotas by artificial means.

The Commission also contests the proposition that the rates of abatement were too strict or that the Commission should have acted earlier since the production of all the undertakings in the Community in respect of Category Id for the first and second quarters of 1983 was less than the overall quotas by 59 734 tonnes (or 9.05%) and 99 370 tonnes (or 13.34%) respectively.

IV — Oral procedure

At the sitting on 23 February 1984, oral argument was presented by L. Funck-Brentano, for Usinor, and F. Benyon, for the Commission.

The Advocate General delivered his opinion at the sitting on 5 April 1984.

Decision

1 By application lodged at the Court Registry on 3 June 1983, the Union Sidérurgique du Nord et de l'Est de la France (Usinor) brought proceedings under Article 33 of the ECSC Treaty for a declaration that the Commission's decision of 27 April 1983 fixing the applicant's production and delivery quotas for the second quarter of 1983, in so far as that decision concerns products in Category Id and Category V, is void.

2 The applicant relies essentially upon two submissions in contesting the Commission's decision. The first submission concerns products in Category V (concrete reinforcing bars), in regard to which the Commission, in the applicant's view, wrongly attributed the reference production to the Usionor group as such and not to its subsidiary, Alpa. The second submission concerns products in Category Id, in regard to which the Commission is alleged to have fixed an insufficient quota, regard being had to the increased demand on the market.

1. Products in Category V

3 Usinor is a group of companies of which Alpa, a distinct legal person in French law, is a wholly-owned subsidiary. Alpa is the only undertaking in the group manufacturing products in Category V (concrete reinforcing bars).

4 According to Article 2 (4) of Decision No 1696/82/ECSC of 30 June 1982 (Official Journal L 191, p. 1), "any group of concentrated undertakings within the meaning of Article 66 of the Treaty shall be regarded as a single undertaking" for the purposes of that decision. By letter of 27 April 1983, which is at the origin of these proceedings, the Commission, considering that Article 2 (4) of Decision No 1696/82 applied to the Usinor group as such, allocated an aggregate quota to the latter without breaking it down between the various subsidiaries of the group.

5 The applicant considers on the other hand that any decision allocating quotas in regard to products in Category V should be directly addressed to

its subsidiary Alpa and contends in that regard that the Commission's decision is based on two unlawful provisions, namely, Article 2 (4) of Decision No 1696/82 which wrongly permits assimilation of a subsidiary to the group of which it is a part and Article 14 of the same decision which, by allowing only the group itself, in the case of concentrated undertakings, the chance to have its quotas adjusted, constitutes discrimination as between undertakings forming part of such a group and those which are independent.

6 The applicant is thus primarily contesting the legality of Article 2 (4) of Decision No 1696/82 on the ground that the Commission is neither entitled to operate on the basis of the definition of a group of undertakings laid down in the Treaty in the context of the rules on mergers and concentrations in situations other than those referred to in Article 66 of the ECSC Treaty nor thus to ignore the definition of an undertaking laid down in Article 80 of the ECSC Treaty. The applicant points out that the concept of an undertaking within the meaning of the Treaty is to be identified with that of a natural or legal person (judgment of 22. 3. 1961, Joined Cases 42 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53).

7 That submission must be rejected. The Commission has not in fact exceeded the power of assessment granted to it by Article 58 of the ECSC Treaty by deciding, for practical reasons, to choose, as the person to whom quotas were to be allocated, the undertaking which directs the group's production activities, such a method permitting the undertaking moreover to divide up the quotas within the group in a way which most closely corresponds to the needs efficient management of production. By thus choosing to allocate quotas under Decision No 1696/82 to the group of concentrated undertakings within the meaning of Article 66 of the ECSC Treaty, the Commission was in no sense acting in a way which was contrary to the definition of an undertaking laid down in Article 80 of the ECSC Treaty, as it has been interpreted, in particular, in the Court's case-law, since neither the distinct legal personality of the undertakings in the group nor their capacity to bring actions individually in regard to matters which concern them, is affected by such a decision.

8 Secondly, the applicant contends that the Commission, when examining applications for an adjustment of quotas within the meaning of Article 14 of Decision No 1696/82, must take account of the position of each undertaking in the group separately and not of that of the entire group of concentrated undertakings within the meaning of Article 66 of the ECSC Treaty.

9 Article 14 of Decision No 1696/82, as amended by Decision No 2751/82/ECSC of 6 October 1982 (Official Journal L 291, p. 8), provides that undertakings may apply for an adjustment in their quota for products in Category V if, *inter alia*, the total production of the products listed in Article 1 did not exceed 700 000 tonnes in 1981, and if production in Categories IV, V and VI represents a large proportion of the undertaking's production.

10 It is not disputed in that regard that the Usinor group, whose production is more than 700 000 tonnes, cannot have the benefit of an adjustment of its reference production for products in Category V. On the other hand, its subsidiary, Alpa, considered that it met all the conditions laid down by Article 14 and therefore applied, by registered letter of 26 May 1983, to be allowed to benefit from that provision. However, the Commission rejected that application on the ground that Alpa was a concentrated undertaking within the Usinor group, which was the sole addressee of the quotas and which was consequently the only person entitled to apply to have the provisions of Decision No 1696/82 applied to it.

11 According to the applicant, the defendant thus created unlawful discrimination between concentrated undertakings and independent undertakings by not taking account of Alpa's specific situation on the sole ground that it was a subsidiary of Usinor.

12 That second part of the first submission must also be rejected. This application is not concerned with the decision taken by the Commission on the application made by Alpa on 26 May 1983 but solely with the Commission's decision of 27 April 1983 allocating quotas to the Usinor group. It should also be pointed out that when the decision was taken, no application for an adjustment of quota had been made either by the applicant

or by Alpa. The Commission cannot therefore be criticized for not having made an adjustment at that time. As regards Alpa's situation, the Court refers to the considerations set out in its judgment of the same date in Case 151/83 (*Alpa* v *Commission* [1984] ECR 3519).

2. Products in Category Id

13 The applicant contends that it manufactures a new product, monogal, which is covered by Category Id and which is increasingly used, in particular in the motor industry, as a replacement for cold-rolled sheet covered by Category Ib. Because of the considerable increase in demand, the present quotas, which were fixed on the basis of earlier references, are totally out of tune with present needs. However, Article 18 of Decision No 1696/82 requires the Commission to carry out the necessary adjustments by general decision "if radical changes occur on the iron and steel market or if the application of this decision encounters any unforeseen difficulties". By not taking account of the growth in demand, the Commission, in the applicant's view, has failed to respect that provision.

14 That submission must be rejected. In so far as the increase in demand for products in Category Id was the result of a reduction in the demand for those in Category Id, was the result of a reduction in the demand for those in Category Ib, the Commission was entitled to consider that it was not appropriate merely to adjust the quotas laid down for products in Category Id, without providing for a simultaneous reduction in the quotas laid down for products in Category Ib. However, such machinery could be established only by a special decision of the Commission, taken after a thorough study of actual market trends and after consultation with industry. it should be pointed out in that connection that the Commission, by Decision No 1619/83 of 8 June 1983 (Official Journal L 159, p. 56), inserted a new article (Article 17a) in Decision No 1696/82, allowing it to grant a partial transfer to Category Id of production and delivery quotas for Category Ib or Ic where an undertaking shows that this is necessary and in so far as such a transfer does not interfere with the working of the system. Even though that decision was adopted roughly a year and a half after the industry had drawn

the attention of the Commission to the early difficulties encountered in regard to products in Category Id, the intervening period cannot be regarded as excessive, regard being had to all the factor known to the Court.

Costs

15 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it 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.**

Mackenzie Stuart Bosco Koopmans

Delivered in open court in Luxembourg on 11 October 1984.

For the Registrar

D. Louterman

Administrator

G. Bosco

President of the First Chamber