OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 1 FEBRUARY 1984 [1]

Mr President,
Members of the Court,

By a decision of 14 December 1982 [2], the Commission found proven various infringements of Article 85 of the Treaty, committed by five undertakings producing rolled zinc products and zinc alloys. Two of them, the Compagnie Royale Asturienne des Mines (hereinafter referred to as "CRAM") and the company Rheinzink GmbH, which are among the most important zinc producers in the Community, commenced proceedings against that decision, seeking to have it declared partially void. Their applications concern in particular two series of infringements of which they are accused by the Commission:

1. Measures to protect the market resulting:

   (a) From concerted action taken by the two undertakings with a view to protecting the German market [3], for which the Commission imposed a fine on each undertaking; and

   (b) From the inclusion in the contracts concluded between CRAM and a Belgian importer, Gebr. Schiltz NV [hereinafter referred to as "Schiltz"], on the one hand, and between Rheinzink and Schlitz, on the other, of a clause requiring Schiltz to sell the goods in a specific country [4];

2. The reciprocal assistance contract concluded between CRAM, Rheinzink and Vieille Montagne, another company producing rolled zinc products [5].

Before examining each of these series of infringements in turn, it must first be noted that the applicant, Rheinzink, considers that the acts of the firm Rheinisches Zinkwalzwerk GmbH & Co., which it succeeded on 1 October 1981, cannot be imputed to it. Since the Commission decision is only capable of adversely affecting the applicant if the infringements alleged by the Commission are proved and the fine imposed, it seems more logical to discuss this submission only in such an eventuality, particularly as CRAM is also accused and contests part of the decision.

I — The measures to protect markets

1. Since the facts are of decisive importance in arriving at a legal assessment of the alleged anti-competitive conduct of the undertakings in question, it seems essential to set them out in detail.

The prices charged by CRAM and Rheinzink for rolled zinc products and zinc alloys are the same in each

1 — Translated from the French.

2 — Decision 82/866/EEC, Official Journal L 362 of 23. 12. 1982, p. 40.

3 — Article 1 (1) of the Commission decision.

4 — Article 1 (2).

5 — Article 3 of Decision 82/866, cited above.

individual country, but vary according to which country is involved. That situation favours a form of speculation consisting of reselling, in a market where prices are high (France and Germany, in particular), zinc bought at a lower price in other Member States (Belgium, for example).

Kestermann, an undertaking specializing in the sale and processing of rolled products, sought, through an intermediary, Schiltz, to benefit from those price differences.

Schiltz, after an unsuccessful first attempt, finally obtained rolled zinc products from Asturienne and Rheinzink on the pretext that they were intended for re-export to the Middle East and in particular to Egypt. On that condition, Asturienne and Rheinzink agreed to deliver 2 000 and 1 252 tonnes respectively to Schiltz in the course of 1976 at prices 15 to 20% lower than the prices charged in the Federal Republic of Germany.

After delivering half the quantity ordered, CRAM accepted three new orders: the first, dated 8 September 1976, was for 240 tonnes to be delivered in October and the two others, dated 11 October, were for the delivery of 631 and 44 tonnes of rolled zinc products at the end of November.

2. In its decision, the Commission made the following findings:

On 21 October, CRAM discontinued its deliveries, the last delivery having been made on the previous day. At that date, 220 of the 240 tonnes had been delivered.

Also on 21 October, Rheinzink accused Schiltz of failing to comply with the export clause.

On 26 October, Rheinzink informed CRAM by telex of a reduction in prices of approximately 3% on the German market.

On 29 October, having received confirmation that Schiltz was re-exporting to Germany, Rheinzink suspended its deliveries and refused to process any of the outstanding orders.

On 8 November, Asturienne demanded payment of certain outstanding invoices from Schiltz.

On 12 November, by telex, it called upon Schiltz to pay 11 outstanding invoices and to furnish proof of the export to Egypt of the 240 tonnes delivered, in the light of the information that the goods had been re-exported to Germany.

3. The Commission drew two conclusions from the rather turbulent relations between CRAM, Rheinzink and Schiltz:

(a) Only concerted action by CRAM and Rheinzink could explain:

the fact the Asturienne suspended all deliveries to Schiltz and Rheinzink made its first accusations of re-export on the same day (21 October);

the fact that Rheinzink informed a competitor of a 3% price reduction (telex communication of 26 October);

the fact that CRAM awaited the outcome of the inquiries made by Rheinzink into the acitivities of Schiltz before demanding payment of the outstanding sums (8 November).

All of these facts demonstrated parallel behaviour *vis-à-vis* Schiltz, the object of such concerted action being the protection of prices on the German market by preventing the re-import of rolled zinc products made in Germany.

(b) The clause requiring Schiltz to export to a specific country, which was contained in the orders and to which attention was drawn by CRAM and Rheinzink, was also a restriction of competition in so far as it deprived the dealer of the freedom to market the goods where he wished and allowed the two suppliers to protect the similar prices which they charged on the French and German markets, by limiting parallel imports in the Community.

I will examine first the allegation of concerted action by the applicants and then, secondly, the problem of the clause requiring re-sale in a specific non-member county.

A — Concerted action to protect the German market

In order to evaluate the concerted practice by which CRAM and Rheinzink attempted to protect their respective markets, I shall build my discussion of the various factors relied on by the Commission in support of its appraisal of the facts around two questions, one relating to the parallel behaviour of the two undertakings, the other relating to the relations demonstrated by the telex message of 26 October 1976.

(a) Did CRAM and Rheinzink engage in parallel behaviour towards Schiltz? (concerted cessation of supplies).

The Commission decision is based primarily on the attitude of CRAM, which acted in line with the behaviour adopted by Rheinzink towards Schiltz.

First factor: the Commission found that on the very day on which CRAM, "suspended its deliveries for no apparent reason, Rheinzink accused Schiltz of not complying with the export-to-Egypt clause" [1].

It concluded that Asturienne's behaviour could be explained by concerted action with Rheinzink. After being informed by the latter of Schiltz's suspected fraud, Asturienne suspended all deliveries on 21 October 1976, which would explain why the order for 240 tonnes had not been completely fulfilled at that date,

1 — Commission Decision, cited above, p. 46.

20 tonnes thereof remaining to be delivered.

That finding is based on an error of fact. As the Commission admitted following the observations presented by CRAM, the order for 240 tonnes was completely fulfilled on 20 October, and the error is not one of detail because any logical connection between the behaviour of Rheinzink and the suspension of deliveries by CRAM in respect of the order for 240 tonnes also disappears.

The Commission none the less considers that, from 21 October, CRAM ceased to deliver to Schiltz since the orders for 631 and 44 tonnes intended for Egypt and Iran respectively, although confirmed by CRAM on 11 October 1976, were never carried out. The communication confirming the order for 631 tonnes indicated that delivery would take place "following Sale No 3446 and, in any event, before the end of November". Thus, in the Commission's view, no interruption was intended between the delivery of 240 tonnes (Sales No 3446) and that of 631 tonnes and therefore the date on which deliveries were suspended was indeed 21 October 1976.

I do not share the Commission's view regarding the relevance of the supposed identical date. The conclusion drawn by the Commission from the delivery period mentioned in the communication confirming the order for 631 tonnes is in no way supported by the text of the communication, which admittedly states that the order was to be fulfilled after the delivery of 240 tonnes, but provides for a range of delivery dates between 21 November and 30 November at the latest. The suspension of deliveries by CRAM cannot therefore be attributed to the behaviour engaged in by Rheinzink on 21 October.

Second factor: Asturienne awaited the outcome of the inquiries conducted by Rheinzink in regard to Schiltz, on 29 October 1976, before demanding payment of the outstanding invoices on 8 November.

This finding of parallel behaviour is not supported by the facts either, as the Commission itself has come to recognize. Long before the date indicated, a dispute had already arisen between CRAM and Schiltz over payment of certain invoices relating to deliveries made in September. By telex messages of 14 October and 2 November, CRAM demanded payment of those invoices from Schiltz. The payment of the invoices relating to the 240 tonnes to be delivered in October gave rise to similar problemes, as is shown by a telex message of 12 November.

Thus, Asturienne's behaviour cannot be explained solely by the alleged communication by Rheinzink of information concerning the results of the inquiry which it had carried out in regard to Schiltz. On the contrary, it is clear from the numerous telex messages exchanged by CRAM and its customer that CRAM's primary concern was to obtain payment for the deliveries carried out and that it only demanded proof of export later on and as a secondary consideration (telex message of 12 November 1976). Consequently, it is not

correct to accuse Asturienne of deciding to suspend the outstanding deliveries "for no apparent reason", as the Commission claims, once it becomes clear that its customer, Schiltz, was delaying payment of the outstanding invoices because of difficulties giving rise to doubts about its solvency.

Certainly, the chronology of events does give the impression of a logical train of behaviour on the part of each of the applicants, taking place moreover within a fairly brief period. However, the factors taken into account by the Commission are not sufficient to prove the existence of any causal relationship between the decisions taken by CRAM and Rheinzink.

(b) What probative value can be attributed to the telex message of 26 October 1976, produced by the Commission in support of its argument? Does the telex message of 26 October reveal the existence of concerted action?

It is true, first of all, that the communication of a reduction in prices to a competitor might indicate a concerted practice between the parties involved, all the more so as, in an oligopolistic market like that in zinc, the producers are rapidly informed by their own customers of changes in the prices of their competitors. Furthermore, both CRAM and Rheinzink have admitted that relations of this kind are fairly rare. Finally the Commission considers the reciprocal assistance contract to be further proof of the contact maintained between the two undertakings.

The Commission itself, however, recognized that the telex message was a secondary factor. It corroborated the finding of concerted action, based on the parallel behaviour of CRAM and Rheinzink, but did not in itself constitute proof thereof, since it had no explicit connection with the activities of Schiltz. The inference drawn from the telex message of 26 October would have carried more weight if the Commission had been able to demonstrate the conclusions that CRAM had drawn from it as regards its own price levels. The other factors indicating contact between CRAM and Rheinzink are also as of a secondary nature. I would merely point out that, if the contact maintained was always as close as the Commission seems to be suggesting, it is difficult to understand why CRAM waited so long before demanding proof of export, when Rheinzink was aware, from 21 October, of Schiltz's acitivities. It should also be noted that a *purely internal* Rheinzink memorandum of 5 November 1976, concerning the activities of Schiltz, makes no mention of the fact that Asturienne had also been victim of the same stratagem.

In the light of all those conclusions, it would appear that the factors assembled by the Commission are not enough to prove that CRAM and Rheinzink "knowingly substituted practical cooperation between them for the risks of competition". [1] The Commission has not shown "sufficiently clear, unequivocal presumptions [which] lead to the

1 — Judgment of 14. 7. 1972, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 64.

conviction that the parallel conduct was the result of concertation, of a coordinated policy". [1]

The complaint made by the applicants against Article 1 (1) of the Commission decision, which found that concerted action was taken by CRAM and Rheinzink *vis-à-vis* Schiltz, should therefore be upheld. Consequently, the fines imposed by the decision for that infringement alone should be declared void. [2]

The proposed solution renders unnecessary any discussion of Rheinzink's submission that the Commission infringed its rights of defence by refusing to allow it to see certain documents. I agree completely, however, with the arguments put forward by the Commission to demonstrate that the submission is unfounded.

B — Clause requiring resale in a specific country

According to the Commission, the obligation to resell in a specific non-member country, as contained in Schiltz's orders to both CRAM and Rheinzink, deprives the seller of the freedom to dispose of the product within the Community, thus protecting the high level of prices charged by the two producers in their respective markets. It therefore has both the object and effect of restricting competition and it also affects trade between the Member States. Only Rheinzink challenges that assessment, the various constituents of which I shall examine in turn.

(a) According to the Commission, *the very object* of the clause was to restrict competition. The consensus of the contracting parties as to the export of the products, together with the different prices charged according to the country of destination entailed a restriction of the buyer's liberty to dispose of the goods supplied.

That analysis does not seem to be supported by the facts. The telex messages and order forms which trace the commercial relations between Rheinzink and Schiltz expressly state the non-member country for which the goods are bound. That statement is the very condition on which the favourable price is granted by the producer to his customer; the destination of the goods delivered is determined by the *purchaser himself in the light of his own economic interests, in order to obtain a substantial reduction.* As regards the different prices charged for export compared to the Community prices, this can be justified both by the producers' desire to establish themselves in a new market and their wish to make optimum use of their production capacity.

The fact that the country of destination is indicated has, in my view, a twofold significance. Being a condition *sine qua non* of the discount granted, it must be included in the contractual documents. For that very reason, it also constitutes the *guarantee* that the product will in fact be exported, because failure to comply with it would involve the loss of the

1 — Case 48/69, cited above, Opinion of Mr Advocate General Mayras, p. 673.

2 — Article 2 of the Commission decision.

commercial advantage granted. Thus, it does not appear that the Commission has proved that the object of the clause was to protect the German market by "restricting the buyer's freedom to use the goods supplied in accordance with his own economic interests". [1] It is however true that the clause might have such an effect.

(b) According to the Commission, the *restrictive effect* of the clause is revealed by the fact that the supplier suspended all deliveries as soon as it discovered Schiltz's deception. That reaction, by both CRAM and Rheinzink, can, according to the Commission, be explained by the desire to protect the prices charged by them in their respective markets and shows unambigiously that it is impossible for a dealer who is bound by such a clause freely to dispose of his goods in the common market; this necessarily has an influence on trade between the Member States. I cannot agree with the Commission's argument.

(i) Its decision is based on an occasional, limited and isolated manifestation of intent on the part of the two undertakings, whose attitude can moreover be justified by the fraud of which Schiltz was guilty in failing to comply with an essential condition of the contracts, namely the grant of a discount for export to a non-member country, and, in CRAM's case, also by the delays in payment of money owed to it.

The Commission does not seem to have demonstrated that the contested clause could, as such, have a restrictive effect on competition. Its argument would have benefited from evidence of a systematic practice of this kind. However, even then, it would in fact only have been a factor demonstrating the existence of a concerted practice in regard to prices.

(ii) In my view, the restriction of competition and the consequent effect on trade between the Member States could not exist without a minimum of concerted action with regard to the *different prices* charged by the two producers, as is clear from the general tenor of the Commission decision and in particular its refusal to apply Article 85 (3) to the contested clause. The maintenance of the price differences noted is in fact the background to this case, without which competition between the producers would lead to a reduction in the price of rolled zinc products resulting from the opportunity which dealers would have to dispose of the products freely within the common market. In that connection, the information supplied is not at all conclusive: the price statistics only cover a short period of three months (January to March 1976), it being noted that they do not cover all the contracts concluded between Schiltz and Rheinzink or between Schiltz and

1 — Judgment of 14. 12. 1983, Case 319/82, *Société de Vente de Ciments et Bétons de l'Est*, [1983] ECR 4173, paragraph 6.

CRAM, some of these having been concluded after March 1976.

(iii) It should finally be noted that the presence of a clause requiring resale to a non-member country, even if it has the indirect effect of preventing re-importation of the goods into the common market, must be evaluated in the light of the purpose of the substantial discount granted on the price of the goods, which may be necessary in order to penetrate a new market and thus constitute an indispensable commercial requirement for the conclusion of the contract, as both Rheinzink and CRAM have claimed without being contradicted by the Commission.

In the light of all those considerations, it does not seem that the Commission has proved with sufficient certainty that the contested clause constitutes an infringement of Article 85 (1). On this point, the complaints made by Rheinzink must be upheld.

II — The reciprocal assistance contract

1. Under this contract, CRAM, Rheinzink and Vieille Montagne undertook to supply each other in the event of "serious technical or other disruption resulting in significant loss of production" (Article 1), that is to say, a loss exceeding 20 tonnes per day or 200 tonnes in total. The deliveries are limited to a maximum of 1 500 tonnes per month when one undertaking is affected, or 2 000 tonnes if two of them are affected (Article 4, points 2 and 3).

The contract was supplied in 1977 because of a strike at Vieille Montagne (delivery by CRAM of 2 427 tonnes of rolled zinc products between April and June and by Rheinzink of 850 tonnes between May and August) and as a result of technical problems at CRAM (delivery of 550 tonnes by Rheinzink).

2. The Commission considers that such a contract is an infringement of Article 85 (1).

The reciprocal assistance contract, which is of indeterminate duration since it is automatically renewable each year (Article 11, point 1), fixes high upper limits for deliveries representing more than one third of the monthly production of the parties concerned. It is thus not a contract of supply or a contract for the exchange of particular services in respect of a product of specified quality, of which the quantity and the price are fixed in advance. According to the Commission, it is an outline contract under which the contracting parties undertake for the future to deliver processed zinc of standard quality to the undertaking in difficulty (Article 3, point 1) in indeterminate quantities and at varying prices (Article 6, point 4).

Such an agreement, according to the Commission, compels the three undertakings to reserve part of their production capacity so as to be able to meet, if necessary, a request for assistance. Consequently, this contract deprives them, by virtue of the fact that they have accepted a collective obligation

to provide each other with assistance, of the possibility of benefiting individually from difficulties encountered by a competitor.

Finally, the Commission states that an agreement between three of the principal producers of rolled zinc products will affect trade between France and Germany, where respectively CRAM and Vieille Montagne, on the one hand, and Rheinzink, on the other, are based.

3. In contradiction of that view, Rheinzink states that the agreement in question does not distort competition and supports that contention with the following arguments:

The object of the contract is to guarantee continuity of supplies to customers, by protecting them against any disruption due to circumstances over which the contracting parties have no control.

The contract has only been applied during three periods, in 1977, in particular because of strikes, mutual assistance in such cases being completely acceptable.

4. Rheinzink's arguments cannot be accepted. It overlooks the nature of the agreement, in terms of both its indeterminate duration and the events which can give rise to its application. The latter are not defined, the contract referring to "technical *or other* disruption", without indicating that the disruption must necessarily be due to circumstances beyond the control of the undertakings, the reference to strikes being rather dubious in this context.

The Commission's appraisal of the terms of the reciprocal assistance contract must therefore be accepted. It is an outline contract by which the parties mutually guarantee their individual market shares in spite of any sort of difficulty which might affect them. In so doing, the three producers have substituted for the risks inherent in competition cooperation amounting to an agreement infringing Article 85 (1).

The applicability of Article 85 (3) must of course be considered. It is true that the economic problems which the European zinc industry is facing at the present time, of which Asturienne's representative informed the Court at the hearing, could explain the producer's wish to reduce the disruption resulting either from the installation of more efficient equipment or, more generally, from any circumstance likely to weaken the zinc industry in the face of competition from outside the Community. It would be necessary, if the exemption provided for in Article 85 (3) is to apply, to consider the exact state of the market in question in order to decide whether or not the reciprocal assistance contract was in conformity with Article 85. It is doubtful, however, whether an agreement concluded between three of the principal producers of zinc would have no effect on the competitive position of the other producers.

In any event, since the applicant neither notified the agreement in question nor subsequently declared its intention to do

so, the exemption in paragraph 3 cannot apply.

In the light of those remarks, the Commission decision should be upheld as far as the infringement of Article 85 relating to the reciprocal assistance contract is concerned.

5. I now come to the submission made by Rheinzink concerning its liability for an infringement committed by the undertaking which it succeeded on 1 October 1981, Rheinisches Zinkwalzwerk GmbH & Co.

Rheinzink claims that only proof of continuity in the unlawful conduct between the two successive undertakings could allow the Commission to address its decision to it. That requirement is not fulfilled in the present case because the infringements of which it is accused took place before the creation of the new company. Rheinzink bases its argument on an interpretation of the Court's decision in the *Suiker Unie* case, where the Court emphasized the need for an "obvious continuity" uniting the undertakings in question in order to consider the successor undertaking liable for the acts of the dissolved one. [1]

The Commission considers, on the other hand, that the succession must be evaluated in the light of the fact that, from an economic point of view, the undertakings have the same function. It is the *economic continuity* which is decisive and not the legal relationship between the successive companies. The Commission again refers to the Court's decision in the *Suiker Unie* case on this point.

In that judgment, which involved an association of cooperatives which had succeeded a previous association and the cooperatives which were members of it, the Court took the view that the behaviour of the two associations was characterized by an "obvious continuity, which means that the whole of this behaviour must be attributed to the applicant" (paragraph 87). However, the Court reached that conclusion on the basis of the following three findings:

The applicant had assumed all the rights and liabilities of the four cooperatives which were members of the former association (paragraph 84);

The applicant did not deny that the name "Suiker Unie" covered "the same undertakings, which were run for the most part by the same persons and had registered offices at the same address" (paragraph 85);

It did not claim that its conduct on the relevant market differed from that of the former association (paragraph 86).

It is clear from those grounds that Rheinzink's interpretation is too narrow. It singles out one of the factors mentioned (the continuity of behaviour) and seems to require that such continuity be demonstrated by continuity of illegal conduct.

The Commission, for its part, puts forward an argument which ignores the

1 — Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie and Others* v *Commission*, [1975] ECR 1663, paragraph 87.

legal aspects of the succession and emphasizes the economic continuity existing between the successive companies. So wide an interpretation is likely to establish an excessively loose causal relationship between the activities of the undertakings.

Before I present my own observations, it is necessary to recall the general imperatives which must guide us in this matter. The problem must be resolved exclusively by reference to the rules of Community law. The application of Community law cannot, without jeopardizing the uniform respect of the Community principles of competition, be made to depend on the rules of national law.

In that connection, as Mr Advocate General Mayras rightly pointed out in the *Suiker Unie* case, Council Regulation No 17/62 must not be deprived of all effectiveness. [1] What would be the real extent of the control exercised by the Commission, if an undertaking were able to circumvent Articles 85 and 86 of the Treaty merely by transforming itself under the rules of national law? Mr Advocate General Mayras quoted as a significant example the case of an undertaking transformed after the occurrence of a course of conduct designed to prevent freedom of competition, but before the establishment by the Commission of an infringement of the rules of the Treaty. In such a case, there was particular cause to fear that the succession of undertakings would allow the successor to avoid Community sanctions, thereby rendering the Commission's powers devoid of substance.

What is the situation in the present case? The hypothesis outlined above corresponds exactly to the situation described by the applicant company, which was formed after 1976 but before the Commission decision. That finding is not sufficient, but it leads me to adopt the Commission's view, subject to some amplification. I share the Commission's view regarding the functional continuity between the two successive companies. They carried on the same economic activities, a point which the applicant does not contest.

I note, moreover, that it assumed the rights and obligations of the company Rheinisches Zinkwalzwerk, as is clear from the trade register and as is recognized by Rheinzink itself, which refers to the provisions of German law.

Moreover, it has not denied that the registered office and the management of the undertaking remained unchanged.

Admittedly, the two successive undertakings are not identical. The name and the legal form are different. It seems to me, however, that the factors mentioned make it sufficiently clear that both the economic and legal links uniting the two undertakings allow their acts to be treated as continuous so as to justify imputing the infringements complained of to Rheinzink.

1 — *Suiker Unie and Others* v *Commission*, cited above, at p. 2078.

In conclusion, I propose

1. That the Court should grant the application made by CRAM and Rheinzink and declare void the decision by which the Commission:

   Found proven the infringements of Article 85 of the Treaty resulting:

   (a) from the concerted action taken by CRAM and Rheinzink in relation to Schiltz; and

   (b) from the clauses requiring resale in a specific country inserted in the contracts concluded by CRAM and Rheinzink with Schiltz; and

   Imposed fines on the applicants for the first infringement mentioned;

2. That the Court should uphold the Commission decision as regards the reciprocal assistance contract.