2. Dismisses the remainder of the application;

3. Orders the Commission to pay the costs.

Galmot Mackenzie Stuart

Due Everling Kakouris

Delivered in open court in Luxembourg on 14 February 1984.

For the Registrar

H. A. Rühl

Principal Administrator

Y. Galmot

President of the Fifth Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 14 DECEMBER 1983 [1]

Mr President,
Members of the Court,

On 10 August 1981 the Commission notified the applicant in these proceedings of its production quota for Category V and VI products for the third quarter of 1981, pursuant to Decision No 1831/81 (Official Journal L 180, 1. 7. 1981, p. 1), as amended by Decision No 1832/81 (Official Journal L 184, 4. 7. 1981, p. 1), and informed it that of that quota, which amounted to 18 057 tonnes, 5 079 tonnes could be delivered in the common market.

The applicant has no objection to the above-mentioned production quota, but does object to the restriction on its deliveries in the common market. It informed the Commission in a letter dated 28 August 1981 that until June 1980 60% of its production was for another undertaking and, since that part of its production was disposed of in the common market by the other undertaking, it had not been taken into account in determining the applicant's reference quantity pursuant to Article 8 of Decision No 1831/81. However, the other undertaking for which the applicant had carried out the processing ceased trading in July 1980 and the

1 — Translated from the German.

applicant therefore had to dispose of its production itself in the common market. Since that circumstance had not been taken into account in fixing the delivery quotas, the applicant demanded that its delivery quota should be increased.

The Commission agreed to that demand after Decision No 2804/81 of 23 September 1981 (which was published in Official Journal 278 of 1. 10. 1981, p. 1, and entered into force on the same date) had added the following paragraph to Article 8 of Decision No 1831/81, which contains provisions for determining the reference quantities which are to be used to fix that part of the quotas which may be delivered by each undertaking within the common market;

"2. If an undertaking can prove that the reference quantities fixed in accordance with paragraph (1) have caused it grave difficulty, the Commission may make appropriate adjustments to the reference quantities for the undertaking concerned in cases where:

there has been a change of more than 20% in the percentage of the undertaking's total deliveries as compared with its total production owing to differences between the undertaking's sales pattern over the period during which Decision 2794/80/ECSC applied and that which existed over the 12 best months, or

the undertaking did not export more than 5% of its total production to non-Community countries over the 12 best months and its deliveries to the common market account for less than 90% of its total production over the best 12 months."

The Commission stated in a notice dated 4 November 1981 that the reference quantity calculated according to Article 8 (1) of Decision No 1831/81 was causing the applicant grave difficulties because it had not made any exports to non-member countries in its best 12 months of production and deliveries within the common market amounted to only 30.29% of the reference production. In recognition of the fact that in the applicant's case its reference quantity appeared disproportionate in relation to its deliveries in the common market after the processing for another undertaking had ceased, the reference quantity was increased to 90% of the reference production, which resulted in a delivery quota of 15 091 tonnes for Category V and VI products in respect of the third quarter of 1981. Furthermore, the Commission stated that the applicant could, in view of the date of the notice of rectification, carry forward the increase allocated to it to the fourth quarter of 1981 in so far as it was not utilized in the third quarter.

In fact, as appeared from subsequent inspections, the applicant did not use its full production quota for the third quarter of 1981, but on the other hand sold 17 946 tonnes of its actual production (17 966 tonnes) on the Community market. That caused the Commission to commence proceedings against the applicant with a view to the imposition of a penalty and, in a letter dated 25 February 1982, to accuse it of exceeding its delivery quota by 2 402 tonnes; that amount arises after taking into account the 3% tolerance laid down in Article 11 (2) of Decision No 1831/81.

The applicant made its observations thereon in a letter dated 9 March 1982. It pointed out that if it had kept to the delivery quota originally laid down its

business whould have been ruined. Since the Commission did not agree to an increase in the delivery quota until after the expiry of the third quarter, the applicant was unable to determine during that period the quantities which it could deliver in the common market and that is why — retrospectively — the delivery quota was exceeded. Moreover, the applicant stated that it was ready to compensate for the excess by reducing its deliveries in the common market in another quarter by 2 402 tonnes. It repeated that statement at a hearing on 11 June 1982. At the same time it alleged that, since the undertaking for which it processed 60% of its production had gone into liquidation, its production had fallen by some 70 to 80%, causing it grave difficulties, and it pointed out that its deliveries in the common market in the third quarter of 1981 had not in any event reached the level of sales which had been made in normal periods.

Nothing that the applicant said however could alter the Commission's conviction that the applicant had infringed the quota system. Consequently, on 27 November 1982 the Commission adopted a decision pursuant to Article 12 of Decision No 1831/81. The decision stated that the quota system did not allow excess deliveries to be compensated for in subsequent quarters and that the applicant had therefore exceeded its delivery quotas in respect of Categories V and VI by 2 402 tonnes. That excess warranted — on the basis of a rate of 75 ECU per tonne of excess — the imposition of a fine of 180 150 ECU (the equivalent of LIT 241 498 281). The applicant was accordingly ordered to pay that amount within two months of receiving notification of the decision and was informed that the amount would be increased by 1% per month of delay in payment.

The decision resulted in an application to the Court on 6 January 1983 for annulment of the notice of 24 November 1981 imposing the fine and, in the alternative, for an appropriate reduction in the fine.

My opinion thereon is as follows:

1. To begin with, the applicant complained in its written observations that notification of the delivery quotas for the third quarter of 1981 was not given until 10 August 1981. It considered that to be unlawful from the point of view of retroactivity. In its view, a measure which was not notified until 10 August 1981 could apply only from that date, especially if it is borne in mind that the annual closure of the applicant's undertaking took place at that time and that there therefore remained only a month in the relevant quarter for organizing production and sales.

I am, first of all, of the opinion that that question cannot and need not now be considered. The criticism made relates, not to the decision imposing the fine which is challenged in the present proceedings, but to an earlier individual decision addressed to the applicant. From the decisions of the Court, however, it is clear that such measures which have not been challenged within the prescribed period cannot, on the

basis of Article 36 of the ECSC Treaty, be brought into proceedings relating to fines (cf. most recently the judgment in Case 265/82). [1] Moreover, the criticism which the applicant has made is now irrelevant, since its conduct was clearly not assessed in the light of the delivery quotas notified to it on 10 August 1981 but in the light of the subsequent rectification notice of 4 November 1981, under which the applicant received a substantially higher delivery quota.

Furthermore it may be said — for the sake of completeness — that the applicant's criticism appears to be quite unfounded. As the Commission has already rightly emphasized in other proceedings (Case 348/82), [2] since Decisions Nos 1831/81 and 1832/81 were published at the beginning of July 1981, it was quite impossible for the undertakings concerned to determine what restrictions on their activities, including sales in the common market (cf. Article 8 of Decision No 1831/81), would be considered. They cannot therefore have been at all surprised when those restrictions were specified in the subsequent individual notices, and consequently it is clearly incorrect to speak of unlawful retroactivity in relation to those notices or their date of issue.

2. The applicant further claimed that the restriction of its deliveries to 5 079 tonnes, as originally notified, was to be regarded as unlawful because it would have caused the applicant considerable difficulties, since it would have been compelled either to reduce its production in so far as its sale was not allowed or to accumulate stocks, which would have absorbed capital needed for purchases. The delivery quota should have been assessed in relation to the volume of production allowed; in any event it was not permissible to restrict deliveries to that which was actually sold during a reference period when it was apparent that at the relevant time 60% to 70% of the production consisted of processing carried out on behalf of another undertaking and that from July 1980 that processing was no longer carried out because the other undertaking had ceased to trade.

In that respect it must be said that retrospectively, after the adoption of Decision No 2804/81, that contention is basically correct. It is, however, equally clear that the applicant could not, during the third quarter of 1981, simlpy assume the unlawfulness of the communication of 10 August 1981 notifying it of its quota and disregard it in organizing its sales. On the contrary, it ought to have challenged it before the Court of Justice on the ground of the inadequacy of Decision No 1831/81 and was entitled to disregard it only after it had been held to be unlawful or there had been an interim order allowing it do so.

3. With regard to the subsequent increase in its delivery quota notified to it on 4 November 1981, the applicant stressed in the written procedure that notification was not given until after the expiry of the third quarter of 1981. It maintains that it therefore had no means of knowing during the third quarter what its correct delivery quota was and it

1 — Judgment of 19. 10. 1983 in Case 265/83 *Union Sidérurgique du Nord et de l'Est de la France "Usinor" v Commission of the European Communities* [1983] ECR 3105.

2 — Case 348/82 *Industrie Riunite Odolesi SpA v Commission of the European Communities* [1983] ECR 1237.

was therefore surely excusable that, during that period, it should have sold more of its permitted production within the common market than the Commission ultimately allowed. I stated at the hearing that the fact that it assumed in good faith that could sell direct to the common market in place of the firm for which it had previously carried out processing was apparent from a letter which that firm had sent to it on 13 August 1981. Furthermore, as regards the rectification notice of 4 November 1981, it stated at the hearing that not only were inadequate reasons given for restricting the increase to 90% of the reference quantity, but such a restriction was inappropriate and consequently its legal basis unjust.

In my opinion, that submission also fails to assist the applicant in its main head of claim.

Quite clearly the notice of 4 November 1981 was not challenged by the applicant within the prescribed period and consequently — in this respect I refer to the well-known cases on Article 36 of the ECSC Treaty — it can no longer be subjected to judicial review in proceedings relating to the fine. In addition it must be said that the applicant has given no justification for its claim that the restriction placed by the Commission on the increase of the delivery quota under Article 8 (2) of Decision No 1831/81 is unlawful; moreover, there do not appear to be any important reasons which the Court should raise of its own motion.

The applicant further emphasizes that it had no means of knowing, before the expiry of the third quarter of 1981, how much of its production it could deliver in the common market; however, the fact remains — if we assume that the original notice did not have to be observed because it was manifestly inappropriate and because the Commission did not immediately give a negative response to the applicant's complaint of 28 August 1981 — that the applicant disposed of almost the whole of its permitted production, to be precise 99.4% thereof, in the common market. I cannot see how such conduct is excusable when, in view of the quota system known to the applicant with its restriction on sales within the common market, it would have been more reasonable to expect a degree of careful restraint which surely would not have caused the applicant any serious difficulties. As far as the applicant's good faith is concerned, the applicant can certainly not rely on the above-mentioned letter from its previous customer of 13 August 1981, which the applicant produced to the Court at the hearing. In that letter, the customer, after mentioning the fact that the products produced by the applicant on its behalf were disposed of in the Federal Republic of Germany, made the quite general remark that the corresponding quotas would have to be allocated by the Commission to the applicant. This could not of course — there being no question of a sale of the quota, which would moreover have needed to be notified in advance to the Commission pursuant to Article 11 of Decision No 1831/81 — justify the assumption, before it was established who would take over the business of the insolvent customer, that the Commission would grant the

applicant, within the framework of rules still to be fixed, delivery quotas which would be exactly equal to its permitted production.

4. Finally, the applicant considers that there was an inconsistency in the Commission's attitude which is relevant to the appraisal of the decision imposing the fine. That inconsistency lay in the fact that, whilst the rectification notice of 4 November 1981 allowed any unused part of the delivery quota to be carried forward to the fourth quarter of 1981, the Commission was not prepared to allow any excess over the delivery quota in the third quarter of 1981 to be compensated for in a subsequent quarter.

I cannot however agree with the applicant on this point either.

It must not indeed be overlooked that the Commission had good reasons for allowing the increase in the delivery quota to be carried forward to the fourth quarter of 1981, because the delivery quota was not rectified until after the expiry of the third quarter and the Commission had to assume that the applicant had not yet had the opportunity to make use of the increased quota. On the other hand, it is important to remember that the quota system operates in principle on a quarterly basis (see the judgment in Case 179/82) [1] and the system can function only if that principle is strictly observed. Whilst in Case 179/82 [1] that principle was departed from and regard was had, although only in assessing the amount of the fine, to the fact that the applicant, which had encountered difficulty in keeping within its quota in one quarter, subsequently did not exhaust its quota, it must not be forgotten that the applicant *immediately* offered such compensation (the Commission in breach of the principles of sound administration did not reply) and that a voluntary reduction in production actually took place in the quarter immediately following. In the present case, however, it does not appear that the applicant did not exhaust its delivery quota in the fourth quarter of 1981 or even — since the amendment to the delivery quota for the third quarter of 1981 was only notified to the applicant during the fourth quarter — in the first quarter of 1982. Moreover, the applicant did not make its offer of compensation immediately after receiving the notice of rectification, but only after proceedings had been commenced in March 1982 with a view to the imposition of a penalty. The Commission can certainly not be criticized for not accepting it and it certainly provides no ground for declaring void or altering the decision imposing the fine.

5. Accordingly, since none of the arguments put forward by the applicant is capable of justifying a declaration that the contested decision is void, it now remains for me to consider the claim for a reduction in the fine. This may certainly be considered if a reduced degree of culpability is to be attributed to the undertaking which has infringed the quota system or there are some other mitigating circumstances.

In the present case it is not possible to escape the fact that the delivery quota originally notified to the applicant was grossly unfair, so that it could scarcely represent a binding criterion for the

1 — Judgment of 19. 10. 1983 in Case 179/82 *Lucchini Siderurgica SpA* v *Commission of the European Communities* [1983] ECR 3083.

applicant's conduct, and that, since the delivery quota was rectified only after expiry of the relevant quarter, the applicant clearly had considerable difficulties in determining the correct course of action in the third quarter of 1981. Furthermore, it must be admitted that a degree of blame is to be attributed to the Commission, because it did not /incorporate in the earlier decision, Decision No 1831/81, a provision similar to that contained in Decision No 2804/81, which would have enabled circumstances such as those of the applicant to be taken into account and the delivery quota to be determined properly from the beginning, so that the applicant would have been able to take the correct action without further difficulty. This doubtless justifies the conclusion that a reduction in the fine is wholly appropriate.

On the other hand, it must also be borne in mind that the applicant could have informed the Commission of the special circumstances of its case immediately after the establishment of the new quota system incorporating the original provisions regarding delivery quotas, and that might have brought about an earlier rectification of the system. Furthermore, account should perhaps also be taken of the fact that, although under Article 12 (2) of Decision No 1831/81 the Commission could have applied a higher rate of fine because the delivery quota was exceeded by almost 20%, it was content to apply the general rate in Article 12 (1). Consequently, in my view any reduction in the fine should remain within modest proportions.

I therefore consider that the applicant's alternative claim appears to be well founded. As far as alteration of the fine is concerned, however, I do not propose any particular figure, but leave this to the discretion of the Court.

6. If the outcome of these proceedings is that which I consider correct, the decision on costs should not cause any particular problems. The application must be considered successful at least in part and there may be said to be exceptional circumstances within the meaning of Article 69 (3) of the Rules of procedure, because the Commission did not make provision in due time in Decision No 1831/81 for the correct determination of the delivery quotas. Accordingly, it seems appropriate that the Commission should be ordered to pay the applicant's costs.

7. I therefore propose that the Court should allow the application, in so far as the alternative claim for a reduction in the fine imposed on the applicant is concerned, and that — after fixing the fine at an appropriate level — it should order the Commission to pay the costs.