2. Orders the applicant to pay the costs, including the costs of the application for interim measures.

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 14 December 1983.

For the Registrar

H. A. Rühl

Principal Administrator

T. Koopmans

President of the Fourth Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 5 OCTOBER 1983 [1]

Mr President,
Members of the Court,

The case on which I am today required to deliver an opinion relates to a fine imposed on the applicant on the basis of Article 9 of Decision No 2794/80 (Official Journal 1980, L 291, p. 1) concerning steel production quotas.

I can briefly summarize the facts of the case as follows:

On 6 April 1981 the applicant was informed of its production quotas for products of Groups I, III and IV and for crude steel for the second quarter of 1981 pursuant to Decision No 2794/80 in conjunction with Decision No 664/81 (Official Journal 1981, L 69, p. 22). The production quota for Group I (538 325 tonnes) was challenged unsuccessfully by the applicant. Its criticism of Decision No 2794/80 was not accepted, nor was its complaint that the production capacity of rolling-mill No 2 in Bremen had been wrongly assessed for the purpose of adjusting the reference production under Article 4 (3) of the

1 — Translated from the German.

decision. Further, the judgment referred to the purpose of Article 58 of the ECSC Treaty and emphasized that the Commission was under no obligation to guarantee the undertakings concerned a minimum level of employment and a minimum level of production determined in accordance with their own criteria of profitability and development.

It is common ground that the applicant did not comply with the production quota allocated to it for products of Group I and recognized by the Court as lawful. That was noted in a letter from the Commission of 1 February 1982, which stated that the quota had been exceeded by 123 072 tonnes. In the course of the consequent administrative proceedings it was agreed that the surplus production was only 122 781 tonnes.

Accordingly, the Commission imposed a fine under Article 9 of Decision No 2794/80. Since the applicant had already produced more in the first quarter of 1981 than was permissible, the second paragraph of Article 9 applied. That reads:

"Where the production of an undertaking exceeds the quota by 10% or more or where the undertaking has already exceeded during one of the previous quarters its quota or quotas, the fines may be up to double these amounts per tonne [namely 75 ECU per tonne in respect of ordinary steels and 150 ECU per tonne in respect of special steels]."

However, since the applicant's balance sheet was negative, the basic fine (75 ECU per tonne) was increased by only 10%. That resulted in a sum of 10 129 432 ECU or DM 23 909 916, which the applicant was ordered to pay by a decision of 13 August 1982.

The applicant brought the matter before the Court with an application to have that decision declared void.

At the same time the applicant applied for a stay of execution. That led to an order of 11 November 1982 to the effect that the operation of Article 2 of the decision of 13 August 1982 would be suspended on condition that a bank guarantee was lodged within 15 days of notification of the order. A second application by the applicant for an unconditional stay of execution until final judgment on the ground that the applicant was not in a position to lodge a bank guarantee was dismissed by an order of 7 December 1982. The bank guarantee does not appear to have been lodged and the Commission is still trying to enforce the fine which is at issue in the present proceedings.

In support of its application, the applicant claims that the concept of necessity, as a general legal principle, is known also to Community law and necessity may justify an otherwise unlawful act or at least exonerate from liability a person who acts under necessity. The applicant found itself in such a state of necessity when it exceeded the production quotas and thus no fine should be imposed on it. The applicant undertaking has suffered very heavy losses since 1974 and they have been made good only by dint of the greatest efforts. If, however, it had observed the quota allocated to it, which

in view of the capacity of rolling-mill No 2 in Bremen of 459 000 tonnes per month would have led to a utilization of the applicant's production capacity far below the Community average for wide-strip rolling mills, it would have suffered so much additional loss that it would not have been able to survive. In those circumstances it was justified in protecting its existence, on which many jobs depended, by exceeding the quota so as to bring its utilization of production capacity up to the Community average, for there could be no doubt that its continued existence outweighed any adverse effect upon the quota system, which moreover was scarcely noticeable because all the other undertakings had been able to sell their production at the prescribed prices and no disturbance of the market was perceptible.

The Commission objects in the first place that the *admissibility* of the applicant's claim appears doubtful in view of the judgment in Case 119/81. [1] Further, it is of the opinion that, even if the principle of necessity were recognized in Community law, it would be difficult, as far as the quota system is concerned, to reconcile it with the object of Article 58 of the ECSC Treaty, especially as the effectiveness of the quota system would be jeopardized. In any event, in the present case the conditions for a plea of necessity are not satisfied, according to the Commission. Thus, if we proceed on the basis of a capacity for rolling-mill No 2 in Bremen which seems justified according to previous decisions of the Court (it must be remembered that the figure of 459 000 tonnes a month was not found by the Court to be proved in the judgments in Cases 119/81 [1] and 303/81 [2]), it cannot be said that the production level of that rolling-mill lay considerably below the Community average. Furthermore, the Commission maintains that it has not been shown that if the applicant had observed the quotas in the second quarter of 1981 there would have been an immediate threat to its existence. Nor does it concede that the interest adversely affected is of less value than the applicant's existence, for there is more at stake than the smooth implementation of the quota system: if production is not properly adjusted to the reduced demand the existence of many undertakings would be threatened. Moreover, according to general legal principles, the danger which is to be avoided by a breach of the law must not have been caused by the person who pleads necessity. In the present case, however, it is clear that the applicant's difficulties are due to management decisions taken long before the introduction of the quota system and relating to the enlargement of its plant in Bremen which had led to enormous losses. Finally, the Commission argues that self-help in reliance on a plea of necessity comes into question only as a last resort if there are no other possibilities of averting the alleged danger. The applicant however had had the possibility, and made no use of it, of obtaining an increase in the quota by means of an application under Article 14 of Decision No 2794/80 when it could have pointed to additional deliveries to non-member

1 — Judgment of 7. 7. 1982 in Case 119/81, *Klockner-Werke AG* v *Commission*, [1982] ECR 2627.

2 — Judgment of 11. 5. 1983 in Joined Cases 303 and 312/81, *Klockner-Werke AG* v *Commission*, [1983] ECR 1507.

countries, and in the proceedings relating to the fixing of the quota it could have made an application for interim measures to have the quota amended.

1. In relation to its *objection of inadmissibility* the Commission states more particularly that, according to the applicant's argument, the necessity was caused by the level of the production quotas; in truth its criticism is thus directed against the level of the quotas and it is seeking, through approval for exceeding the quotas, to obtain nothing other than an increase in the original quotas. It ought however, according to the Commission, to have sought that in the proceedings relating to the fixing of the quotas, as it has now done in Case 219/82. [1] However, after the judgment in Case 119/81, [2] which related to the allocation of quotas for the second quarter of 1981, that is no longer possible. The Commission submits that, properly understood, the binding force of that judgment does not allow matters to be raised which already existed at the time of the earlier proceedings and were connected with the subject-matter thereof if the purpose of raising those matters is to pursue the same object as in the previous proceedings.

However, I do not find that view completely convincing.

(a) First, it must be noted that the argument put forward by the Commission now is to some extent in conflict with the argument put forward in Case 219/82 [1] to the effect that the lawfulness of a decision fixing quotas cannot be challenged on the ground of necessity because necessity can justify only *unlawful* conduct and thus cannot be pleaded with the object of altering a legal rule. If that were so — which is not of course to be decided now — the applicant could hardly have pleaded necessity in order to contest the decision on quotas in Case 119/81 [2] and therefore naturally the argument based on necessity cannot now be excluded on the ground that the applicant neglected to deal with it in those proceedings.

(b) Secondly, Article 42 of the Rules of Procedure of the Court, which lays down for proceedings before the Court a principle of concentrated pleading, is not applicable in the present proceedings in relation to the argument pleaded by the applicant. That provision obviously relates only to conduct in one and the same proceedings; nothing therefore can be derived from it in relation to the admissibility of issues in later, separate proceedings.

(c) However, in so far as the Commission seeks to rely on a plea of *res judicata*, on the basis of Article 65 of the Rules of Procedure, then the question to be asked is "what is the subject-matter of the proceedings?" or "what is the claim pursued in them?". Where that claim has already been adjudicated on, the binding nature of the judgment excludes the possibility of its being raised in fresh proceedings.

The claim made on various grounds in Case 119/81 for annulment of the decision fixing quotas for the second quarter of 1981 was dismissed and it is therefore established — according to

1 — Case 219/82, *Klöckner-Werke AG* v *Commission*, not yet decided.

2 — Judgment of 7. 7. 1982 in Case 119/81, *Klöckner-Werke AG* v *Commission*, [1982] ECR 2627.

the operative part and the relevant paragraphs in the grounds of the judgment in Case 119/81 — that that decision was lawful. Now, however, it is no longer a question of determining the appropriate production quotas for the second quarter of 1981: the issue is whether disregard of a lawfully fixed quota may be punished by a fine or whether that is excluded because certain grounds of justification or exoneration from liability may be pleaded. Since nothing was said about that in Case 119/81, that is, nothing was said about the Commission's right to impose a penalty and the grounds which might militate against it, fresh proceedings on that issue, with corresponding further arguments, cannot be excluded. In particular, they cannot be excluded on the ground that Article 9 of Decision No 2794/80 allows no discretion, so that a fine is practically the automatic consequence of exceeding the quota; although the judgment in Case 312/81 [1] spoke of an *obligation* to impose fines when quotas are exceeded, that does not of course mean, as other proceedings have in the meantime made clear, that questions of justification or culpability can be excluded in proceedings concerning fines.

2. If then a detailed analysis of the applicant's arguments in relation to *necessity* is undertaken, the preliminary question whether it exists as a legal concept in Community law may, in my view, be answered without reservation in the affirmative; to substantiate that view does not now require a detailed exposition of comparative law.

First, I can refer to the opinion of the Director of the Max-Planck-Institute for Foreign and International Criminal Law of 6 November 1982, which the applicant submitted to the Court. They show that such a legal concept is to be encountered in the legal systems of all the Member States and, although in the United Kingdom and Ireland — apart from occasional statutes in which special provisions are made — the position is somewhat different, similar results are obtained by means of the procedural law and the taking into account of mitigating circumstances.

Further, certain judgments of this Court are relevant here. I am thinking not so much of Case 312/81, [1] where all that is stated is "even supposing that the concept of an emergency situation were admitted in principle into Community law" (paragraph 47), but rather of Case 16/61, [2] which was concerned with penalties for disregard of list prices and where the related principle of legitimate self-protection was discussed. There it was held that such a defence presupposed an action taken by a person which was essential in order to ward off a danger threatening him; the threat must be immediate, the danger imminent and there must be no other lawful means of avoiding it. The judgment recently

1 — Judgment of 11. 5. 1983 in Joined Cases 303 and 312/81, *Klockner-Werke AG* v *Commission* [1983] ECR 1507.

2 — Judgment of 12. 7. 1962 in Case 16/61, *Aciaierie Ferriere e Fonderie di Modena* v *High Authority*, [1962] ECR 289.

given in Joined Cases 100 to 103/80 [1] is also relevant; paragraph 90 thereof deals with the defence of necessity and states that it presupposes a threat to the existence of the person who relies on it and a finding that an infringement of the law was the only means of ensuring his survival.

3. Greater difficulties would, on the other hand, be involved in determining the precise scope of the defence of necessity in Community law, on the basis of the legal principles common to the Member States, in particular if we inquired into the question how far it can claim a place in economic law, which is apparent only in certain countries, such as Germany, Belgium and the Netherlands. Further, it would be necessary to inquire whether the special nature of the quota system provided for in Article 58 of the ECSC Treaty excludes recourse to the plea of necessity when quotas are not observed, because, as the Commission submits, it would be incompatible with the object of that provision and would jeopardize the effectiveness of the quota system.

However, there is no need to consider all those matters now, for in my view there are other reasons which show in the present case at least that there is no ground for declaring void the contested decision to impose a fine on account of the necessity in which the applicant found itself.

(a) In that regard, it is only natural to refer to what was said in the judgment in Case 312/81,[2] which concerned a fine imposed when the applicant exceeded its quota for the first quarter of 1981. It was in fact held, in reply to a similar argument, that the award of a quota which was insufficient in relation to the undertaking's actual production capacity could not be taken into consideration (paragraph 44). The very high cost of the restructuring carried out by the undertaking since 1973 was due to a policy decision of the undertaking itself; necessity could not, however, be recognized if the perilous situation which was alleged to justify the unlawful act was brought about by the author of that act (paragraph 45). The quota system would be gravely compromised, or indeed set at nought, if every undertaking were able, by pleading an emergency situation due to serious economic difficulties, to excuse itself from observance of the restrictions and to exceed at will the production quota allocated to it; the chain reaction thereby released would culminate in the collapse of the system (paragraph 46).

The matter is not however to be left there, since the applicant emphasized at the hearing that the findings in the judgment were in part due to a misunderstanding of its arguments in relation to its production capacity and were in part not correct because it is possible to rely on necessity in spite of having contributed to creating the danger which was to be averted. Moreover, the applicant had already argued at length in the written procedure against the assumption that the quota system would collapse if individual undertakings were

1 — Judgment of 7. 6. 1983 in Joined Cases 100 to 103/80, *Pioneer and Others* v *Commission*, [1983] ECR 1825.

2 — Judgment of 11. 5. 1983 in Joined Cases 303 and 312/81, *Klöckner-Werke AG* v *Commission*, [1983] ECR 1507.

allowed to exceed their quotas in reliance on necessity.

(b) An essential condition for a plea of necessity is the existence of an actual, immediate danger to the applicant, a direct threat to its existence, which cannot be countered by means other than a breach of the law. That much may be regarded as having been established on the basis of the research into comparative law available to us and may thus be regarded as part of Community law. In neither respect has the applicant been able to show in the present proceedings that those conditions were satisfied in its case.

(i) The applicant stated that, if it had kept to its production quota in the second quarter of 1981 instead of producing an amount equivalent of the average utilization of capacity of rolling-mills in the Community, it would have suffered an additional loss of DM 21 000 000. In doing so it relied on an opinion given in respect of the third quarter of 1981 which provided appropriate computations for the entire period of validity of Decision No 1831/81 (Official Journal 1981, L 180, p. 1), namely July 1981 to June 1982. Also to be taken into account were the losses arising from the quota system as a whole, that is the additional losses which the applicant would have incurred if it had observed the production quotas until June 1983 and which, according to the expert opinion it produced, were set at DM 500 000 000. It would have been impossible, in the applicant's view, to make good those losses since it had in any case already suffered heavy losses since 1974, which it had been able to make good only with considerable efforts and by disregarding the quotas. If it had incurred such losses it would have been doomed to collapse and therefore, to avoid that result, it was justified in disregarding the decisions fixing quotas.

I join with the Commission in disagreeing with the applicant's view. It can remain open whether the figures given by the applicant are in fact correct. Of greater importance in judging the argument in relation to necessity was, as the applicant itself admitted, the position at the beginning of the second quarter of 1981, because the production programme for the quarter in question had to be determined at the beginning of March 1981. Therefore, since the conditions for acting out of necessity must be satisfied at the time the relevant actions are undertaken, the question is solely what the applicant's position was at that time. Consequently, no account can be taken of the alleged additional losses which were to be feared from a new quota system after the expiry of the system based on Decision No 2794/80, for it was not known in March 1981 whether there would in fact be a new system or what form it would take. If however the figure (feared loss: some 20 million German marks) given for the second quarter of 1981 is taken, then there is no ground for supposing that the applicant's existence was threatened or that jobs were in jeopardy to any appreciable extent.

The applicant itself seems to accept as much, since it considered it necessary to take account of all the additional losses feared by it up to June 1983 and because it explained that it could not have

withstood even a fifth of them, that is some 100 million German marks. It should also be noted that it has not proved the validity of its explanation that because of liquidity problems it would have come to the end of its resources very much earlier. It is also surprising that its experts did not inquire whether the losses might not have been compensated by positive results in other aspects of the company's operations or by exceptional profits and that in relation to the question of the applicant's solvency they explained only in a general way that the figures they found were ominous. It is also relevant in this connection, as the Commission rightly observed, that the applicant was able, according to its own admissions, to make good a loss of DM 1 500 000 000 by September 1981 and that it has explained only in a vague way that afterwards, that is in Autumn 1981, it had scarcely any assets.

That well justifies the conclusion, without any special expert opinion, that in the second quarter of 1981 there can on no account be said to have been a crisis threatening the applicant's existence. Necessity cannot therefore be pleaded in order to justify or excuse the infringement of the quotas which alone has to be dealt with in the present proceedings and thus to challenge the justice of the fine imposed on the applicant.

(ii) As far as concerns the other relevant consideration — namely, that self-help on the ground of necessity is only permissible as a last resort, if no other means are available — it is necessary to bear in mind the possibility of an application under Article 14 of Decision No 2794/80, which could have been made not only, as we know from other cases, where the utilization of production capacity differed considerably from the average in the Community, but also on account of exports to non-member countries. Indeed it is difficult to see why that possibility of lawfully expanding its production held out no prospect of success for the applicant on the ground that it could not obtain orders in non-member countries, as was said in explanation of why no such application was made. Against that the Commission was able to point out that such efforts had been very successful in the case of other undertakings. In that regard, the applicant's statements at the hearing in Case 244/81 [1] may be recalled, to the effect that the applicant made no additional sales efforts in non-member countries and that it would have pursued a quite different production policy if exports had not been fundamentally restricted by the production quotas. Moreover, we know from the hearing in this case that for the *third* quarter of 1981 the applicant made an application for an increase in its production quotas on account of additional exports, which, because of the absence of a provision in the quota system then in force corresponding to Article 14 of Decision No 2794/80, could not be successful.

On the other hand, the Commission referred — rightly, in my view — to the possibility, not exploited by the

1 — Judgment of 11. 5. 1983 in Case 244/81, *Klöckner-Werke AG* v *Commission*, [1983] ECR 1451.

applicant, of applying for interim measures in the proceedings relating to the applicant's production quotas for the second quarter of 1981, that is, attempting to obtain an increase in production by due legal process, to which recourse should be had before any self-help. If the applicant was really convinced that it was in a state of necessity (in Case 244/81 [1] relating to the third quarter of 1981, it used the argument of necessity to claim the minimum quota necessary for survival), that path could not at the time have appeared to offer no prospect of success. The fact that the Commission described the argument in those proceedings as invalid is no proper argument in defence for the applicant now.

4. After that it seems to me unnecessary to discuss the questions whether in fact the interest defended by the applicant, namely its own existence, was of greater worth than the interests adversely affected by the infringement of the quota and whether any significance attaches to the argument that the applicant contributed to the state of necessity by its previous business decisions. In any event, it is clear that the applicant cannot justify or excuse disregard of the relevant quota decision on the ground of necessity. Since it has not put forward any other arguments in its defence, the contested decision to impose a fine cannot be quashed or varied.

5. I can therefore only propose that the application should be dismissed as unfounded and the applicant be ordered to pay the costs, including the costs of the applications for interim measures.

1 — Judgment of 11. 5. 1983 in Case 244/81, *Klockner-Werke AG* v *Commission*, [1983] ECR 1451.