REPORT FOR THE HEARING
delivered in Case 350/85 *

I — Facts and procedure

1. By letter dated 11 October 1983 the Commission, pursuant to Decision No 2177/83 of 28 July 1983 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (Official Journal 1983, L 208, p. 1), notified the applicant, the iron and steel undertaking of Cockerill-Sambre SA, Seraing, of its decision fixing the applicant's production quota for the fourth quarter of 1983 for steel products in Category IV at 113 612 tonnes.

2. Since information supplied by the applicant to the Commission showed that the applicant's production for the fourth quarter exceeded by 910 tonnes the quota allocated to it, taking into account the adjustments made (4 432 tonnes excess less the tolerance margin of 3 522 tonnes), the Commission, by letter dated 14 June 1985, requested the applicant to submit its observations.

3. By letter dated 25 June 1985 the applicant sent the Commission the following information:

'...

We would inform you that there was a fire at our plant at Valfil in January 1983; the plant started to operate again on 27 June 1983 but at a reduced capacity.

We have accordingly been forced to enlist the aid of various competing steel works to satisfy our customers.

...

During the fourth quarter 28 000 tonnes of orders and quotas were entrusted to Thyssen, of which 4 892 were not used and were returned during the first quarter of 1984. The return of that tonnage in respect of the fourth quarter not only removes the excess of 910 tonnes which was subject to a fine but also the 3 522 tonnes not so subject and even results in a shortfall of 460 tonnes.

It is our contention therefore that the apparent excess above the quota exists solely at the book-keeping level because it was not administratively possible to show the quota which Thyssen did not use during the fourth quarter of 1983 in our accounts before the first quarter of 1984. The excess to which you refer therefore does not exist in fact. It is purely notional.

...'.

4. On 9 October 1985 the Commission adopted the contested decision, namely individual Decision No S(85)1603/8 concerning a fine imposed under Article 58 of the ECSC Treaty on Cockerill-Sambre for exceeding the production quota for Category IV during the fourth quarter of

* Language of the Case: French.

1983 by 910 tonnes in breach of Decision No 2177/83.

According to the preamble to that decision:

(i) the applicant did not challenge the amount of the excess;

(ii) the first paragraph of Article 12 of Decision No 2177/83 provides for a fine, generally of 100 ECU for each tonne in excess;

(iii) the uncertainty during the fourth quarter of 1983 as to the extension of the quota system justifies a reduction in the standard rate of fine to 50 ECU per tonne of excess;

(iv) the special circumstances of the fire at Valfil justifies an additional reduction in the rate to 25 ECU per tonne; and

(v) in view of the amount of the excess a fine of 22 750 ECU should be imposed.

The decision was received by the applicant on 17 October 1985.

5. By application received at the Court Registry on 18 November 1985 the applicant brought the present action pursuant to Article 36 of the ECSC Treaty.

6. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

7. By a decision of 4 June 1986 the Court assigned the case to the Sixth Chamber.

II — Conclusions of the parties

1. The *applicant* claims that the Court should:

Declare that the application is well founded;

Declare void Commission Decision No S(85)1603/8 of 9 October 1985 imposing a fine of 22 750 ECU on the applicant for exceeding its quota during the fourth quarter of 1983;

Order the Commission to pay the costs.

2. The *Commission* contends that the Court should:

Dismiss the action as unfounded;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. The *applicant* admits that if its actual production for the fourth quarter of 1983 is added to the total of quotas transferred to other producers under subcontracts the result is an excess of 4 432 tonnes over the quota granted by the Commission to the applicant for that quarter. However, where an undertaking carries out processing for another steel undertaking, its activity is to be treated as the activity of a production centre of the second undertaking. It is only on that basis that it is possible to obtain a precise calculation which is not distorted of the total production achieved on behalf of the transferor undertaking during a particular quarter; such a calculation is fully compatible with the quarterly nature of the quota system. There is no doubt that in order to assess whether a steel undertaking has exceeded its quotas it is necessary to

add up the production achieved in the various production centres. If that rule is applied to the applicant for the fourth quarter of 1983 it will be seen that the applicant's total production is 460 tonnes less than the quotas allocated to it. During that quarter Thyssen produced 4 892 tonnes less than the quota which the applicant had transferred to it. Consequently the excess with which the applicant is charged is only a book-keeping entry since the quota unused by Thyssen during the fourth quarter could not be included in the applicant's accounts until 1984.

Since Article 12 of Decision No 2177/83 authorizes the Commission to impose fines only where the production quotas are actually exceeded, the contested decision has no lawful basis and should therefore be declared void.

2. The *Commission* contends that the applicant's reasoning is based on a false premise. The production of the undertaking to which the quota is transferred is not treated and could not be treated as that of the transferor, but is the transferee's production. That is the direct consequence of the transfer of the quota, which is to transfer from the transferor to the transferee the right, under Community law, to produce the corresponding quantities. It is for that reason that the transferee has to declare transfers to the Commission so that the latter may take account of them in determining whether the transferee has exceeded its production quota as increased by the transfer. It is true that it is possible that the contract transferring the quota may require the transferee to use the quota assigned solely for the purposes and within the limits stipulated in the contract, but such conditions between the parties have no effect in Community law. The transfer allows the transferee to produce on its own behalf or on behalf of another undertaking; the transferee becomes the holder of the right to use the quota transferred and is required to observe it during the quarter to which it applies.

In the second place the Commission states that the quarterly basis on which the quota system has operated since its establishment is intended to allow undertakings to establish their production programmes and to give the Commission an opportunity to take account of variations in supply and demand and experience acquired in imposing fresh quotas for the following quarter. Article 11 (4) of Decision No 2177/83 subjects transfers of quotas to the same quarterly rules as all the other elements of the quota system and allows undertakings, after making a prior declaration to the Commission, to enter into arrangements with other undertakings 'during the current quarter' for the exchange or sale of quotas 'pertaining to that quarter'. It is therefore not possible to take account of quotas returned by the transferee to the transferor during the following quarter to determine the quota available to the transferor during the quarter in question.

O. Due
Judge-Rapporteur