OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 14 JULY 1983

My Lords,

This is an action brought by a French steel producer ("Usinor"), which is a member of the European Confederation of Iron and Steel Industries (Eurofer), for the annulment of a Commission decision dated 13 August 1982 imposing a fine of 641 700 ECU because Usinor infringed Commission Decision No 1831/81/ECSC of 24 June 1981 (OJ 1981, L 180 of 1 July 1981) in exceeding its production quota for the third quarter of 1981. In the alternative Usinor claims that the fine should be reduced.

Decision No 1831/81/ECSC set up a system of production quotas for steel products applicable from 1 July 1981 to 30 June 1982 (see Article 16 (2)). Under Article 5 the Commission is to fix quarterly for each undertaking (1) its production quota and (2) that part of the quota which could be delivered in the common market. How the quota is to be calculated is set out in other articles of the decision. Article 11 (1) allows a tolerance of 3%. Article 11 (4) provides that undertakings may exchange or sell their quotas or proportions of quota relating to the current quarter.

Article 10 provides as follows:

"With regard to products of Category Ia which are used in the form of hot-rolled products for the production in the Community of welded tubes with a diameter not larger than 406·4 mm, the Commission shall, at the undertaking's request accompanied by proof of use for such a purpose, adjust the quota and authorize the relevant deliveries."

Under Article 12 a fine, "generally of 75 ECU for each tonne in excess", can be imposed if an undertaking exceeds its quota.

In this case the Commission fixed Usinor's production quota for the third quarter on 29 July 1981. On 22 September Usinor asked that the quota should be adjusted pursuant to Article 10 of the decision. On 10 November the Commission wrote to Eurofer explaining how it calculated the adjustment both for deliveries in the common market, and for the production quota itself. It appeared from this letter (as Usinor says, but the Commission denies, for the first time) that in making its calculation the Commission related deliveries in a particular quarter to the production quota for that same quarter. On 4 December Usinor pointed out that if this formula was followed in the third quarter its production quota would be exceeded because production of the steel in question exceeded deliveries by 17 708 tonnes. 12 794 tonnes included in that

quantity was part of an order from Corinth Pipeworks SA, a Greek enterprise, accepted by Usinor in August for 41 300 tonnes of hot-rolled steel coils for manufacture into welded steel pipes, delivery to be "in partial shipments at mill's option after September 1981". The particular consignment was manufactured in the third quarter but only delivered in October because the ship was not available to load, and it seems may have been delayed by factors outside Usinor's control. Accordingly, Usinor asked that its quota should be adjusted to take account of this.

By letter dated 23 December 1981 the Commission increased Usinor's production quota for Category Ia products to 671 852 tonnes, and the part which could be delivered in the Community to 442 905 tonnes, in each case an increase of 14 132 tonnes over the July figures.

In fact, it appeared that production in the third quarter of this steel was 685 990 tonnes, an increase of 8 556 tonnes over the permitted quota as adjusted by the 3% tolerance.

On 16 March 1982 the Commission wrote to Usinor informing it of this and asking for its observations. Usinor replied by letter dated 26 March 1982 saying that the reason for the excess was that the Commission had not taken account of the actual level of production when making the adjustment under Article 10. Figures have been produced which show that, in the fourth quarter of 1981, the level of production was less than the production quota for that quarter, because the adjustment made under Article 10 was again calculated on the basis of deliveries, the level of deliveries being raised because it included the Corinth Pipeworks consignment which had been manufactured in the previous quarter. Overall, in the second half of 1981, the production quota had not been exceeded with regard to products in Category Ia falling within the quota system. After further exchanges between the parties, the Commission adopted the decision on 13 August 1982 fining Usinor on the basis of 75 ECU for each of the 8 556 tonnes. This was notified to Usinor on 24 August and the application commencing proceedings was lodged on 27 September 1982.

Although it may be that Usinor could have avoided exceeding the quota had it not sold or exchanged part of its original quota under Article 11 (4) of Decision No 1831/81/ECSC, it is clear that, even taking into account the parts of the quota assigned to other undertakings, the quota would not have been exceeded if the Commission had made an adjustment which covered the delivery in the fourth quarter of the Corinth consignment in fact produced in the third quarter. The consequence of this is that Usinor has been fined for exceeding the quota even though the excess is attributable to products which the Commission accepts fall within Article 10 of the decision. The issue is thus to which quarter these products should be attributed.

Decision No 1831/81/ECSC in this respect seems to me to be clear. The manufacturer of Category Ia products risks being fined if he in any quarter has made more than the quota initially fixed, as adjusted (a) by any permissible purchases or exchanges, (b) by the tolerance of 3%, (c) by the amount of any such steel as is in fact used in the form of hot-rolled products for the production in the Community of the specified tubes. The adjustment under (c) can strictly only be made after proof of *use*, but the Commission is apparently willing to accept proof of delivery for such use as proof of use. Plainly manufacture of the Ia products and the use of those products for the authorized purpose may take place at different times and in different places. Delivery and, *a fortiori*, actual use of that steel to make the tubes may take place later in the same quarter, or in later quarters, particularly if the steel is only made at the end of a quarter. The adjustment under (c) can thus only be made *ex post facto*. It is, however, still an adjustment of the production quota for the quarter in which the steel is produced. Accordingly, if proof is adduced that steel made in one quarter was used to make tubes in a later quarter it is the quota for the first-mentioned quarter which must be adjusted. There is no discretion to make a partial adjustment.

I cannot accept, as the Commission appeared to contend in the oral argument, that it is an accurate application of the system for a manufacturer to notify as part of his *production* figures for one quarter quantities of steel delivered in that quarter but produced in an earlier quarter. Accordingly, in my view the Commission should have adjusted the quota for the third quarter to include the steel made in the third quarter but delivered in the fourth quarter and then used to make the specified tubes.

The difficulty in this case is that Usinor did not challenge the decision, notified in the letter of 23 December 1981, which fixed the adjustment to be made under Article 10. In consequence it remains bound by the terms of that decision, and as a matter of law, did exceed the quota fixed. Article 1 of the decision challenged in this action, which states that in exceeding the quota fixed for the third quarter Usinor infringed Decision No 1831/81/ECSC, cannot therefore, in my view, be annulled.

Moreover, it does not seem to me, as Usinor appears to argue, that the third paragraph of Article 36 of the Treaty establishing the European Coal and Steel Community enables the Court to annul a decision which has not been challenged in time (see, for example, Case 3/59 *Germany* v *High Authority* [1960] ECR 53 at p. 61).

Nor does it seem to me that there is any breach of a rule of legal certainty as Usinor submits. It may well be that the

Commission only made its method of interpretation and application of Article 10 known, orally, on 1 November 1981 or by the letter of 10 November 1981. What matters in this context, however, is not what the Commission thought Decision No 1831/81/ECSC meant, but what it did mean and whether its meaning was clear. The fact that the Commission revealed its erroneous interpretation later, in Usinor's contention, is not in any way a breach of the principle relied on.

For these reasons the claim for annulment should be rejected.

In the alternative, Usinor claims that the fine should be reduced because it acted in good faith and caused no damage to the Community. In addition, the quota was exceeded only in formal terms, not in substance, in a relatively small amount, and the infringement was not therefore serious enough to justify the fine imposed.

Article 12 of Decision No 1831/81/ECSC gives the Commission discretion in the fixing of the appropriate fine to be imposed on an undertaking. Counsel for the Commission contended that this discretion can be exercised only in special cases, such as that of an insolvent undertaking; in all other cases the "general" rule should be followed, that the fine should be 75 ECU for each tonne in excess of the quota. Though I accept the Commission's submission that breaches should be looked at quarter by quarter rather than over a longer period, I am not satisfied that Article 12 should be construed as narrowly as has been suggested. Nevertheless, whatever the Commission could or should have done, the Court has unlimited jurisdiction under Article 36 of the Treaty. This is not, in my opinion, a case where the fine should be reduced, even to a symbolic figure. It should be cancelled entirely, because it has been imposed in respect of production which should have been covered by an adjustment of the quota had the Commission applied Article 10 correctly. The only reason why the decision cannot be annulled is because Usinor failed to challenge the decision adjusting the quota.

In these circumstances it is unnecessary to consider Usinor's arguments that the decision also violated the principle of proportionality.

In the application, Usinor also claimed "financial costs" without specifying what they were. It was only at the hearing that counsel for Usinor made it plain that she meant the costs of the bank guarantee which was provided against payment of the fine pending judgment. No argument has been put to the Court in support of this claim. Nonetheless, the Court has unlimited jurisdiction and may therefore order the Commission to pay damages even if this has not been properly claimed in the pleadings (e.g. Case 44/59 *Fiddelaar* v *Commission* [1960] ECR 535 at pp. 542 and 543, Case 23/69 *Fiehn* v *Commission* [1970] ECR 547 at paragraph 17 and Case 24/79 *Oberthür*

v *Commission* [1980] ECR 1743 at paragraph 14). Although the decision imposing the fine cannot be annulled, it does, in my opinion, constitute in the circumstances of this case a wrongful act which has caused loss to Usinor. So far as can be seen, that loss is limited to the costs incurred in providing the bank guarantee but no evidence has been produced to the Court showing the amount of the loss. As a result, it would in my view be appropriate to declare that the Commission is liable in damages for the costs of the bank guarantee and order the parties to inform the Court, within two months of the date of judgment, of the amount of compensation agreed between them, without prejudice to the submission of evidence and further argument on the point at the expiry of that period, in the event that no agreement is reached.

In my view this is a proper case in which to order the Commission to pay the costs, despite the fact that Usinor has failed in its claim for annulment.

In my opinion, therefore,

(a) the application for annulment of the Decision of 13 August 1982 should be rejected;

(b) the fine imposed should be cancelled;

(c) the Commission should pay to Usinor damages equal to the costs incurred in providing the bank guarantee supplied by Usinor;

(d) the Commission should pay the costs of these proceedings.