OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 4 June 1987 *

Mr President,
Members of the Court,

1. By an application lodged on 2 December 1985 Finsider SpA asked the Court to declare void or reduce the fine of 2 165 350 ECU imposed upon it by the Commission of the European Communities on 9 October 1985 for having exceeded production and delivery quotas in the second quarter of 1983 in respect of steel products of category Ia.

On 24 June 1981, in view of the serious crisis still affecting the European steel industry, the Commission introduced by Decision No 1831/81/ECSC of 24 June 1981 (Official Journal 1981, L 180, p. 1) a new system for controlling production. In the fourth recital in the preamble to that decision it is stated that 'experience has shown that the fixing of production quotas for hot-rolled wide strip is not . . . sufficient to re-establish market equilibrium. Since only one quarter of hot-rolled strip production is placed as such on the market, it is . . . sufficient to subject to . . . quotas hot-rolled wide strip in the form of a finished product and products manufactured from such . . . strip'. In order to secure full effectiveness for the system category I (hot-rolled wide and narrow strip), which had previously been subject to quotas, was released. 'In view of the differing market trends in these products', derived products of category I were subdivided into four groups (a, b, c and d) and made subject to quotas.

In particular, category Ia covers 'hot-rolled wide strip for direct use and export, [and] . . . for re-rolling or other conversion processes in . . . Community undertakings' other than the manufacturer itself (first and second indents of the second paragraph of Article 1). It is easy to see that these products are defined on the basis of their intended purpose, and consequently, as far as the quota system is concerned, they are taken into consideration not at the time at which they are produced, but when they physically leave the steel mill. Consequently, as far as category Ia is concerned production and delivery coincide. The practical consequence of this is that each undertaking must take care in planning the quantity and quality of the steel to be produced; otherwise they will accumulate strip of which, because it is subject to Community quotas, only some will be able to be sold as category Ia products.

2. Finsider's request for the annulment of the contested decision is based on two submissions: (a) infringement of Articles 2, 4 and 11 (6) of Commission Decision No 1696/82/ECSC of 30 June 1982 (Official Journal 1982, L 191, p. 1), which extended the system of monitoring and production quotas introduced by Decision No 1831/81; and (b) misuse of powers on the grounds of discrimination and infringement of the principle of legitimate expectations.

Essentially Finsider's argument is that the quantity of strip produced and delivered by it in excess of the limits laid down for it in the second quarter of 1983 must be

* Translated from the Italian.

regarded as legitimate. It considers that that excess should be counted as part of the stocks which were in store on the date of issue of Decision No 1696/82 and which undertakings were lawfully entitled to utilize in subsequent quarters. In its view, that argument is supported by the second subparagraph of Article 2 (1) of Decision No 1696/82 and by the practice adopted by the Commission. The provision in question provides that undertakings are required to report 'in the case of the products referred to in Article 4 . . . their stock position as at 30 June 1982.' That is to say, a form of words is used which some undertakings, recalling that in the previous year the Commission had permitted them to charge against stocks quantities of strip which had been delivered in excess during previous quarters, read as giving them authorization to sell stocks accumulated between 30 June 1981 and 30 June 1982. For its part, the Commission had not overtly opposed that interpretation and, in any event, did not penalize operators for exceeding quotas.

The Commission disagrees. In its defence it says that the contested decision expressly states that, in accordance with Article 11 (6) of Decision No 1831/81 (and hence also in accordance with the identical provision of Decision No 1696/82), the production of strip falling within category Ia could be charged only against the quota for the quarter in which it was assigned to the operations specified in Article 1. As a result, 'the building of a stock of such products is precluded as from the entry into force of Decision No 1831/81; . . . consequently, the only deliveries of products of category Ia effected after 1 July 1981 which the Commission [allowed] . . . not to be charged against the quota are deliveries of products which were manufactured before that date and in stock as at 30 June 1981'.

Finsider claims in reply that that explanation is manifestly unacceptable. In fact, whereas after 30 June 1981 only 'physical' stocks, that is to say stocks actually in store, could be taken into account to absorb any excesses with respect to quotas, they were certainly disposed of within a few months pursuant to normal stock rotation which is carried out to take account of stock deterioration. It follows that on 30 June 1982 no undertaking could have had stocks to report if that expression is intended to mean stocks which were actually in store the year before; but in that case the requirement set out in Article 2, which applies to *all* products subject to the new system, would be to no purpose.

Therefore, in order to avoid that absurd conclusion it is necessary to hold that the requirement in question refers not to physical stocks, but to so-called 'accounting' stocks. In other words, Article 11 (6) prohibits undertakings from *increasing* their stocks of products of category Ia, for instance by increasing them from level 1 (representing the quantity of strip in store as at 30 June 1981) to level 1+x, but does not prohibit undertakings from *maintaining* the stocks at the level attained on that date. It is only in the light of that interpretation that the duty to report the stock position as at 30 June 1982 can be complied with in the case of products of category Ia. If so, to be penalized for utilizing the stocks in question is patently contrary to Article 2.

In any event, even if the Commission's argument is accepted, it is certainly not acceptable that the supervisory body should apply an administrative practice arbitrarily

and discriminatorily. Yet, in this case, owing to the mere fact that it produced and delivered strip of category Ia, Finsider could not avail itself of the advantage granted to undertakings producing steel falling into the other three categories. In that respect, there is no doubt that the contested decision is vitiated by misuse of powers.

3. The two arguments should be dismissed. The applicant, as we have seen, maintains that between 30 June 1981 and 30 June 1982 it had the right to accumulate, at least up to a certain *ceiling*, stocks of products of category Ia, which it was entitled to use subsequently to cover deliveries of such products effected in excess of the Community limits. I would observe that if that argument were justified, Finsider should have contested the legality of the delivery quotas laid down for it in respect of the second quarter of 1983. But it did not do so and, since the decision by which the Commission notified it of those limits has been definitive for some time, it cannot do so now by asking for a fine to be annulled (see the Court's judgment of 10 December 1986 in Case 41/85 *Sideradria* v *Commission* [1986] ECR 3917, paragraph 10). In any case, I am convinced that on the date at which general decision No 1831/81 was issued steel companies could not have stocks of products of category Ia nor could they build new stocks of such products.

I pointed out in Section 1 above that before that date — that is to say 1 July 1981 — there was only one category I which was subject to the quota system and it included, *inter alia*, strip. When the relevant products were released from the quota system, strip 'sold or exported' (category Ia), and steel products falling into groups Ib, Ic and Id were subjected to quotas instead. As the Commission has explained, the resultant reform gave rise to a problem with regard to the transitional system, since on 1 July 1981 the undertakings might have in their stores stocks of strip belonging to the former category I which had been manufactured in compliance with the production quotas laid down by the previous rules.

However, if after that date that strip had been marketed as products of the new category Ia, the manufacturer would have had to comply with the limits laid down for delivery quotas as a result of the rule by which production and sale are treated as being equivalent. In other words, strip manufactured as a product of category I but *sold* or *exported* after 1 July 1981 as a steel product of category Ia would have 'paid' twice. In order to get round this difficulty the Commission allowed undertakings at that time to absorb the excesses with regard to delivery quotas of category Ia products into stocks of old category I strip which were in store on 30 June 1981. As regards products falling within categories Ib, Ic and Id, to which the rule 'production = delivery' does not apply, the supervisory body merely refrained from subjecting steel products manufactured before the reform to the relevant delivery restrictions (as regards that practice, which has already been applied in the past, see the order of 16 December 1980 in Case 258/80 R *Rumi* v *Commission* [1980] ECR 3867, paragraph 16).

In the final analysis it appears from the picture which we have traced above that (a) there could not have been stocks of category Ia products on 30 June 1981 since that category had only just been created; and (b) as from 1 July 1981 it became unlawful to constitute such stocks owing to the rule 'production = delivery'. Hence this explains the reason for which the Commission never took account of such

stocks. Furthermore, since the continuing existence on 30 June 1982 of stocks of strip produced before July 1981 is precluded, it is obvious that the reporting requirement laid down in Article 2 of Decision No 1696/82 could not refer to strip of category Ia. As a result, to claim that that provision was infringed is baseless.

Finsider's charge that the Commission was guilty of discriminatory treatment is likewise unfounded. In that connection I would point out that the requirement to report the stock position as at 30 June 1982 was laid down in order to enable more effective supervision of compliance with *production* quotas and certainly not to justify possible overshooting of delivery quotas (see third recital in the preamble to Decision No 1696/82). Consequently, Article 2 did not give undertakings the right to utilize stocks which had been built up in the course of the year 1981-82; nor is it conceivable that the Commission should have tolerated such conduct. As I have already said, strip of category Ia differs from other strip in so far as it can be legally identified only at the time when it leaves the steel mill, and hence it is not possible to constitute stocks of such products. In view of that distinction — which, I repeat, the legislature incorporated 'to ensure the complete effectiveness of the [new quota] system' — the Commission could not enable unlawfully constituted or maintained stocks to be used without jeopardizing the whole reform. In those circumstances the decision to penalize Finsider for exceeding quotas cannot be regarded as discriminatory.

4. Let us now turn to Finsider's request that the fine be reduced. The contested decision recognizes that 'the uncertain situation in the second quarter of 1983 with regard to the extension of the quota system warrants a reduction in the rate . . . for that period [from 100 ECU to] 50 ECU per tonne in excess' (p. 5, third recital). However, it must be pointed out that under the first paragraph of Article 12 of Decision No 1696/82 fines are to be calculated on the basis, not of 100 ECU, but of '75 ECU for each tonne in excess'. Accordingly, the Commission has erred and this should be corrected in accordance with the claim made by the applicant.

5. On the basis of the foregoing considerations I propose that the Court should:

(a) reduce the fine which the Commission of the European Communities imposed on Finsider SpA from 2 165 350 ECU to 1 600 000 ECU; and

(b) for the rest dismiss the application made by Finsider SpA by application lodged on 2 December 1985.

As regards the costs, I propose that the Court should order that the parties should bear their own costs pursuant to Article 69 (3) of the Rules of Procedure.