REPORT FOR THE HEARING
delivered in Case 32/86 *

I — Facts and procedure

1. By a letter of 11 October 1983, the Commission informed the applicant, Società industrie siderurgiche meccaniche e affini SpA (Sisma), a steel undertaking whose registered office is in Milan, of its production quotas for the fourth quarter of 1983 and that part of those quotas which could be delivered in the common market.

In response to a request from the applicant on 15 September 1983, the Commission, in a letter of 29 December 1983, received by the applicant on 9 January 1984, noted in particular that the applicant had obtained 'exceptional orders for exports to the Soviet Union of special products regarded as being of special interest to the Community', that 'the total quantity ordered in regard to products in category VI [exceeded] by more than 10% that part of the quotas which [the applicant was not] authorized to deliver in the common market' and that the orders in question were 'obtained on terms corresponding to the official prices on the world steel market were above the normal level [of the applicant's exports] to the Soviet Union during the last three years'; it granted the applicant an additional production quota for the fourth quarter of 1983 of 1 491 tonnes in respect of category VI. The Commission stated that the applicant fulfilled 'all the conditions laid down in Article 14C of [Commission] 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), which provides, in particular, that:

'1) The Commission may allocate additional quotas to undertakings:

which have received orders from third countries exceeding by over 10% the part of the quota which the undertaking is not authorized to deliver in the common market,

which make an application to this effect, accompanied by supporting documents, within six weeks of the quarter in which the export took place,

. . . .

2) If the Commission establishes that these orders are in the interest of the Community, the Commission shall allocate additional quotas to these undertakings corresponding to the quantity in excess of the threshold mentioned in the first indent of paragraph 1.

. . . .'

2. By letter of 10 February 1984, the applicant applied to the Commission for additional quotas for the first quarter of 1984 under Article 14C of Commission Decision No 234/84 of 31 January 1984 (Official Journal 1984, L 29, p. 1) extending the system of monitoring and production quotas, which is drafted in similar terms to the aforementioned Article 14C of Decision No 2177/83. The ground for the applicant's request was the fact that it had received an order for 4 452 tonnes of rolled products coming within category VI to be delivered to the USSR during the first

* Language of the Case: Italian.

quarter of 1984 that is to say, a quantity exceeding by over 10% the part of the quota which the applicant was not authorized to deliver in the common market.

3. By letter of 14 February 1984, the Commission informed the applicant of its production quotas for the first quarter of 1984 and of the part of those quotas which it was authorized to deliver in the common market. It is common ground that, in that decision, the Commission did not take account of the request made by the applicant in its abovementioned letter of 10 February 1984.

4. In a letter of 19 March 1984, the applicant informed the Commission that 'in order to relieve the pressure of sales on the Community market', it had 'obtained an order from the Soviet Union, to be delivered by 15 April 1984' for 1 428 tonnes of hot rolled sections having 'all the characteristics required to be regarded as special sections'. According to the applicant, such special sections were are not manufactured by any other Community producer and were not therefore 'likely to give rise to any disturbance of the Community steel market'. Consequently, according to the applicant, the sections involved should not be subject to the production quota system established by the aforementioned Decision No 234/84 and, as such, should be 'exempt from any Community obligation since they are to be delivered to a non-member country'.

5. In a letter of 17 April 1984, the Commission replied to the applicant's request of 10 February 1984 without taking account of the letter of 19 March 1984. The Commission stated, *inter alia*, that the applicant fulfilled 'all the conditions required by Article 14C of Decision No 2177/83', that the applicant had obtained 'exceptional orders for exports of special products to the Soviet Union which [were] of a certain interest to the Community' and that the total quantity of products in category VI ordered exceeded by over 10% the part of the quota which the applicant was not authorized to deliver in the common market. Therefore, pursuant to Article 14C of Decision No 234/84, the Commission granted the applicant an additional production quota in respect of category VI for the first quarter of 1984 of 610 tonnes.

6. In a letter of 22 May 1984, the Commission replied to the applicant's letter of 19 March 1984. In that letter, the Commission informed the applicant that having regard to the quantities to be exported, Article 14C of Decision No 234/84 could not be applied to the case in question. Moreover, it stated that with regard to the characteristics of the products in question and the particular use to which they were to be put, 'even special products developed by a very small number of undertakings for very specific uses [are] subject to the quota system even to the extent that [Article 10 (2) of Decision No 234/84] provides for the allocation of additional quotas to undertakings' if special products represent at least 50% by weight of their production in the category or categories in question. Consequently, in the Commission's view, the quantities of special sections at issue must be included in the declarations required to be made to the Commission under the quota system.

7. In a letter of 14 August 1984, the Commission complained that the applicant had exceeded its production quotas for the fourth quarter of 1983 in respect of categories IV and VI by 660 and 462 tonnes respectively. More particularly, that letter stated the following:

'In a letter of 11 October 1984, the Commission . . . informed you of the decision in which it fixed . . . your production quotas for the fourth quarter of 1983 and the part of those quotas which

you were authorized to deliver in the common market.

In particular, it fixed . . . at 4 277 and 25 692 tonnes the production quotas for categories IV and VI respectively.

Subsequently, in a decision which was notified to you on 29 December 1983, it increased your production quota in respect of category VI by 1 491 tonnes.

Furthermore, you sold 2 500 tonnes of your production quota in respect of category IV in accordance with Article 11 (4) of Decision No 2177/83/ECSC.

Moreover, under Article 11 (3) (a) of that decision, you were entitled to carry forward into the third quarter of 1983, 185 and 1 328 tonnes of the production quotas for categories IV and VI respectively.

Consequently, during the fourth quarter of 1983, you had . . . production quotas amounting to 1 962 and 28 511 tonnes for categories IV and VI respectively.

It is clear from the statements you have made to the Commission . . . that during that quarter . . . your net production in categories IV and VI amounted to 2 681 and 29 381 tonnes respectively.

Having regard to the tolerance allowed in Article 11 (1) of Decision No 2177/83/ ECSC, it would thus appear that you have exceeded . . . the production quotas allocated to you for categories IV and VI by 660 and 462 tonnes respectively.

. . . '.

The applicant submitted its observations regarding those excesses in its letter of 18 September 1984 and during the hearing which took place on 14 December 1984.

8. In the meantime, in a letter of 27 November 1984, the Commission informed the applicant of its finding that even after taking account of the additional quota of 610 tonnes in respect of category VI, the applicant had exceeded its production quotas for the first quarter of 1984 by 51 and 3 375 tonnes for categories IV and VI respectively.

The applicant submitted its observations on that finding in a letter of 2 February 1985 and it made oral submissions at the hearing on 26 April 1985.

9. By a decision of 18 June 1985, the Commission imposed on the applicant a fine of 27 850 ECU for exceeding its production quota for the fourth quarter of 1983 by 652 tonnes in respect of category IV and 462 tonnes in respect of category VI.

10. Finally, by a letter of 27 December 1985, which was received by the applicant on 8 January 1986, the Commission transmitted a copy of the decision 'which the Commission adopted on 20 December 1985' and which imposed on the applicant a fine of 85 650 ECU for having exceeded the production quota for the first quarter of 1984 by 51 tonnes for category IV and by 3 375 tonnes for category VI.

According to that copy of the decision, the decision was adopted on 27 December 1985 (not 20 December 1985, as the Commission's covering letter indicated) having regard to Decision No 234/84 'most recently amended by Commission Decision No 2760/85' of 30 September 1985 (Official Journal 1985, L 260, p. 7), which came into force on 2 October 1985 and provides that, under certain conditions, the Commission may grant additional quotas to an undertaking which is the sole steel undertaking in the country in which it is situated. Finally, it can be seen from the

recitals in the preamble to the decision, *inter alia*, that:

'[The applicant] has taken advantage of its right under Article 11 (3) (d) of the decision [No 234/84] to carry over into the first quarter of 1984 the unused quotas for the fourth quarter of 1983 in respect of products in categories IV and VI . . . ;

[The applicant] claims that the Commission informed it of the additional production quota allocated under Article 14C of Decision No 234/84 of 1 491 tonnes in respect of category VI only in a letter of 29 December 1983 and that, consequently, that additional quota could not be used during the fourth quarter of 1983; for that reason, [the applicant] included that tonnage in the quota for the first quarter of 1984;

[The applicant] objected that part of its production, to be delivered on the Soviet market, must be regarded as production of special sections and, as such, not subject to the quota system;

. . .

Article 11 (3) (d) of Decision No 234/84 is not applicable to [the applicant] which had exceeded its production quotas for the fourth quarter of 1983 in respect of categories IV and VI;

The additional production quota granted in the Commission's letter of 29 December 1983 was used to cover quantities already produced by [the applicant] during the fourth quarter of 1983; that quantity may not therefore be included in the quota for the following quarter, even though the Commission's letter arrived at the end of the quarter to which it referred;

Even if the sections produced by [the applicant] for the Soviet market were of such a nature as to be properly regarded as special sections, that would not justify the failure to declare those products because even special products and sections are subject to the quota system, as can be seen from Article 4 (1) of Decision No 234/84;

On the other hand, the Commission failed to warn [the applicant] of its erroneous interpretation of Article 11 (3) (d) of Decision No 234/84, as the Commission has already admitted in the individual decision of 18 June 1985 concerning a fine imposed on the same undertaking under Article 58 of the ECSC Treaty;

. . .

The infringements found to exist make [the applicant] liable to a fine under Article 58 of the ECSC Treaty which could be as great as the value of the unlawful production;

The first paragraph of Article 12 of Decision No 234/84 provides for a fine, generally of 100 ECU for each tonne in excess in the case of an undertaking exceeding its production quotas;

The uncertain situation during the first quarter of 1984 with regard to the extension of the quota system justifies, in regard to that quarter, a reduction of the basic rate to 50 ECU for each tonne in excess;

The fact that the Commission did not inform [the applicant] that its interpretation of Article 11 (3) (d) of Decision No 234/84 was erroneous justifies the reduction to 25 ECU of the fine to be levied for each tonne in excess;

. . . '.

An extract from the decision was published in an Official Journal of 31 December 1985 (C 347, p.1) communicating the 'Decisions of the Commission of the European Communities of 20 December 1985 . . . '.

11. By an application lodged at the Court Registry on 7 February 1986 the applicant brought the present action under Article 36 of the ECSC Treaty for a declaration that the Commission's decision of 20 or 27 December 1985 is void.

12. 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. However, the Court called upon the Commission to produce certain documents.

13. By decision of 5 November 1986, the Court assigned the case to the Second Chamber.

II — Conclusions of the parties

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

(i) Declare void the Commission's decision of 20 or 27 December 1985;

(ii) In the alternative, amend the said decision so as to reduce the fine to a nominal or at any rate appropriate sum;

(iii) In any event, order the Commission to pay the costs.

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

(i) Dismiss the application;

(ii) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The *applicant* advances three submissions:

A — Breach of essential procedural requirements;

B — Infringement of the Treaty and its implementing rules, in particular Decision No 234/84;

C — Breach of general principles by virtue of the failure to recognize exceptional circumstances which warrant a different assessment of the existence, or at least the gravity, of the infringement and which justify a consequent reduction of the fine to a purely nominal sum.

A — *Breach of essential procedural requirements*

1. In the applicant's view, the breach of essential procedural requirements must be considered from two aspects, the formal breach itself, and the insufficient or contradictory statement of the reasons for the contested measure.

With regard to the first point, the applicant points out that the covering letter accompanying the decision at issue, dated 27 December 1985, indicated that the decision had been adopted by the Commission on 20 December 1985. However, in the text of the decision itself, it was stated on several

occasions that the fine had been imposed on 27 December 1985. Since uncertainty as to dates and time-limits is often 'fatal' for undertakings, it should also be so for the Commission. If the decision was adopted on 27 December, that is to say, between the Christmas and New Year holidays, the question also arises as to whether the rules delegating authority were actually complied with. Moreover, the applicant sees a further ground for complaint in the fact that at the beginning of the decision, reference is made to Decision No 2760/85 as being the legal basis for the sanction. However, that decision came into force in October 1985 whereas this case concerns the first quarter of 1984. Consequently, either Decision No 2760/85 is not relevant, in which case it should not be mentioned, or it is applicable, in which case the applicant should be awarded the additional quotas provided for in that decision.

Furthermore, the applicant emphasizes that the statement of reasons on which the decision at issue is based fails to indicate either the production quotas allocated or the mathematical calculation on the basis of which the alleged excess was determined. There is also a lack of concrete references in regard to the unproved allegations to the effect that the applicant exceeded its production quotas during the fourth quarter of 1983 and that the additional quota of 1 491 tonnes granted at a very late stage, that is to say, in January 1984, should be included in the quota for the preceding quarter. However, on notification, a decision should contain all necessary information. It is not therefore sufficient for the undertaking to be able to reconstruct, with the help of the documents in its possession, the facts of the case and the reasoning probably followed by the Commission in support of its claim (see judgment of 13 June 1958 in Case 9/56 *Meroni & Co.* v *High Authority* [1957 and 1958] ECR 133).

2. In the first place, the Commission explains that the decision at issue was adopted on 20 December 1985 (as was indicated in the communication in the Official Journal, C series, of 31.12. 1985) and that the error in the copy transmitted to the applicant is merely a clerical error which does not affect the substance of the measure. In this case, the error could not have caused any difficulties for the applicant since the time-limit for bringing an action begins not on the date on which a decision is adopted but on the date on which the decision is notified to the addressee, in this instance, therefore 8 January 1986. Secondly, the Commission emphasizes that Decision No 2760/85 was cited in the contested decision merely because it was the most recent amendment of the underlying general Decision (No 234/84) to which the contested decision refers.

With regard to the statement of reasons on which the contested decision is based, the Commission points out that the extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it was adopted (see judgment of 28 March 1984 in Case 8/83 *Bertoli* v *Commission* [1984] ECR 1649). In this case, the decision is self-sufficient but furthermore the steps preceding it made it possible both for the applicant to understand the reasons on which it was based and for the Court to exercise its power of judicial review. The applicant is in possession of the letter of 14 February 1984, in which it was informed of its production quotas for the first quarter of 1984, and also the letter of 27 November 1984 in which it was informed of the complaints based on Article 36 of the ECSC Treaty and of the minutes of the hearing of 26 April 1985 during which the parties presented their respective arguments. Finally, the applicant's argument concerning evidence of its exceeding its production quotas for the fourth quarter of 1983 is contradicted by

the fact that, in respect of that infringement, a decision of 18 June 1985 imposed a fine on the applicant which it did not contest.

B — *Infringement of the Treaty and its implementing rules*

1. In the *applicant's* view, this submission involves two separate infringements:

(a) an error of calculation inasmuch as account was not taken of all the quotas to which the applicant was entitled during the period under consideration;

(b) abusive application of the fine having regard to the repeated instances of maladministration on the part of the Commission.

(a) With regard to the first limb of the submission, the applicant points out that the Commission, in a letter dated 29 December 1983, which was received by the applicant on 9 January 1984, accepted that the orders for the export of special products to the Soviet Union were exceptional and granted the applicant an additional production quota of 1 491 tonnes. However, even though that letter indicated that the quota in question was in respect of the fourth quarter of 1983, the applicant had a clear right to transfer that quantity to the first quarter of 1984 because the statement in the contested decision to the effect that that letter 'arrived at the end of the quarter to which it referred' is incorrect. Similarly, the Commission's statement in the decision in question to the effect that the 1 491 tonnes were used 'to cover quantities already produced by [the applicant] during the fourth quarter of 1983' is also incorrect. There is no trace of that transaction in the amending decision of 18 June 1985. Consequently, the 1 491 tonnes in question must be included in the quota for the first quarter of 1984. Moreover, if the Commission, at the end of December 1983, regarded the sections to be sent to the USSR as special products entitling the applicant to additional quotas, there is no explanation why that should no longer be the case and, therefore, why the Commission did not grant the applicant's request of 19 March 1984 for confirmation that an order for 1 428 tonnes of special sections to be manufactured and shipped to the Soviet market during the first quarter of 1984 would not be regarded as subject to the quota system. Finally, even if the Court agrees with the Commission's view that those special sections do fall within the quota system, the Commission none the less remains under an obligation to grant an additional quota under Article 10 (2) of Decision No 234/84, as the Commission accepted in its letter of 22 May 1984. If the 1 491 tonnes is added to the 1 428 tonnes referred to and allowance is made for the 3% tolerance provided for in Article 11 of Decision No 234/84, the total is approximately equal to the quantities in issue. Thus, since it is the established practice of the Commission not to take proceedings against undertakings which exceed their quotas by small amounts, the applicant believes that it has made out its submission that the Treaty has been infringed.

(b) With regard to the second limb of the submission, the applicant complains that the Commission adopted the contested decision 'automatically' without giving detailed consideration to the applicant's position. Moreover, the uncertainties and omissions, which the Commission explicitly acknowledges in the contested decision, should justify more than merely reducing the fine. When, as in this case, they continue for an indefinite period beyond the quarter in question, they may give rise to errors on the part of undertakings, which

have an actual right not to have proceedings taken against them. The contested decision should therefore be declared void.

2. (a) The *Commission* points out, on the one hand, that the letter of 29 December 1983 expressly indicated that the 1 491 tonnes were granted in respect of the fourth quarter of 1983 and, on the other, that it had taken account of that additional quota in calculating the excess for the said quarter, which made it possible to reduce the excess in respect of category VI. Moreover, the Commission considers that there is nothing contradictory in its position concerning the 1 428 tonnes for the Soviet market. As a result of an express request from the applicant, the Commission adopted a decision, communicated by letter of 29 December 1983, to the effect that the conditions laid down in Article 14C of Decision No 2177/83 had been fulfilled and that therefore an additional production quota of 1 491 tonnes could be allocated to the applicant in respect of the fourth quarter of 1983. However, the 1 428 tonnes referred to in the applicant's letter of 19 March 1984 constituted too small a quantity compared to the quotas allocated to the applicant to bring into operation the mechanism provided for in Article 14C. Similarly, Article 10 (2) of Decision No 234/84 merely provides that the Commission may, but is not required to, allocate additional quotas if the undertaking fulfils certain conditions and if the specific nature of the products in question is not such as to remove them completely from the scope of Community rules, as the applicant claimed in its letter of 19 March 1984. Finally, the Commission points out that in that letter the applicant indicated that the products were to be delivered during the second quarter of 1984. However, in those circumstances, the order in question could not have any influence on the applicant's quota for the first quarter of 1984 and that also invalidates the applicant's argument to the effect that if the 1 428 tonnes and the 1 491 tonnes were attributed to the first quarter of 1984, the excess for that quarter which is the object of the dispute would be practically eliminated.

(b) Finally, the Commission rejects the second limb of the appliant's submission. What the applicant regards as a tendency to act automatically is merely the normal form of words used in all decisions imposing penalties. In actual fact, in this case, the applicant received better treatment than that to which it was entitled since the statement of the reasons on which the contested decision is based includes a passage which grants it for the second time, that is to say, for two consecutive quarters, a reduction in the rate of fine on the basis of a single omission on the part of the Commission.

C — *The existence of exceptional circumstances*

1. In the applicant's opinion, if the complaints set out above do not justify the contested decision being declared void, they should be taken into account as factors demonstrating the existence of exceptional circumstances, that is to say, of such a nature as to justify a merely nominal fine.

In that regard, the applicant also draws attention to the disappointing results which it has obtained for many years. Moreover, throughout 1983, the applicant was unable to use more than 8 000 tonnes of the overall production quotas allocated to it. However, equity requires that before severe penalties for alleged quota infringements are imposed on an undertaking, account should be taken of the consequences of the undertaking's behaviour for the system in general, all the

more so as the conduct of the Commission itself in regard to the closure of quarterly accounts has been uncertain and contradictory.

2. The *Commission* merely points out that if exceptional circumstances actually exist, account may be taken of them when the applicant comes to pay the fine, if the latter makes an appropriate application to the Commission.

O. Due
Judge-Rapporteur