OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 26 OCTOBER 1983 [1]

Mr President,
Members of the Court,

This case concerns a fine imposed on the applicant pursuant to Article 9 of Decision No 2794/80 for exceeding the production quota allocated to it for the fourth quarter of 1980.

By letter of 1 November 1980 the applicant was informed that its production quota for the fourth quarter of 1980 in respect of products falling within Category IV was 5 753 tonnes. When it came to light that the applicant's production declarations, on the basis of which the reference production figure was calculated, had omitted work carried out on behalf of third parties, an appropriate adjustment was made and by letter of 23 November 1981 it was informed that its production quota for the fourth quarter of 1980 had in fact been 5 792 tonnes.

The applicant did not in fact adhere to those limits. According to the reports of the inspectors appointed by the Commission it appeared at first as if the applicant had produced 6 798 tonnes in the fourth quarter of 1980. On the basis of that and taking into account the production quota fixed originally the Commission referred in a letter dated 6 October 1981, by which it initiated proceedings for a pecuniary sanction under Article 36 of the European Coal and Steel Community Treaty, to unlawful production which exceeded the quota by 1 045 tonnes.

After the Commission's inspectors had established the specific quantity of electricity used by the applicant and the applicant at the beginning of June 1981 admitted to having produced a further 1 000 tonnes the Commission stated in a further letter dated 30 November 1981 that the applicant's excess production was 2 045 tonnes.

In response to the complaint the applicant made an initial statement dated 12 October 1981 pointing out that the Commission had failed to take into account the increase of its original production quota to 5 792 tonnes in its letter initiating proceedings for a pecuniary sanction. In addition it claimed that its actual production of 6 798 tonnes could not really be regarded as exceeding its quota on the one hand because account must be taken of the tolerance of 3 % provided for in Article 8 (1) of Decision No 2794/80, giving a production allowance of 5 964 tonnes in all, and on the other hand because the applicants's indirect export of 994 tonnes to Libya should not be taken into account.

In a second statement dated 14 December 1981 the applicant renewed its assertion that the Commission had failed in its letter of 30 November 1981 to take account of the alteration to the production quota. In addition it pointed out that the applicant had already received the aforementioned export order before Decision No 2794/80 came into effect, and stated that the additional production of 1 000 tonnes, which had not been declared until 2 June 1981, was part of work carried out on behalf of third persons.

1 — Translated from the German.

As a result the Commission amended the complaint to the effect that the applicant's excess production amounted in any event to 2 007 tonnes, based on the revised production quota.

The applicant commented once more at a hearing on 21 April 1982, at which it conceded that it had actually produced 7 798 tonnes, and in a letter dated 31 May 1982. Essentially it relied on the fact that the alleged excess production corresponded to a consignment which had been exported to a non-member country in fulfilment of an order which had been accepted before Decision No 2794/80 came into effect. It contended that it had taken the view, in good faith, that exports were not included in the quota rules; in any case it had not been aware that an application under Article 14 of Decision No 2794/80 was necessary in that connection.

It also pointed out that it had ceased production in November and December and that it had had to refuse orders in an effort to comply with the quota allocated to it.

Subsequently, on 13 August 1982, the Commission adopted a decision pursuant to Article 9 of Decision No 2794/80. In the decision it stated that the applicant was not able to rely on Article 8 (1) of Decision No 2794/80 because it only made products falling withing *one* category; the allusion to export deliveries to Libya was not admissible because the Commission had not been notified of it as provided for in Decision No 2794/80, and because the applicant did not submit a request under Article 14 of Decision No 2794/80 in respect of it in good time. Since the excess production amounted to 2 007 tonnes in respect of products falling within Category IV, thus exceeding the quota by more than 10 %, it was possible to apply the second paragraph of Article 9 of Decision No 2794/80; however, since the applicant was in a bad financial position, a rate of only 82.5 ECU per excess tonne would be applied, giving a total of 165 570 ECU (equal to LIT 218 762 674). The applicant was requested to pay that sum within two months of notification of the decision and it was also stated that the fine would increase by 1 % for each month that the sum remained outstanding.

On 17 September 1982 the applicant brought an action before the Court of Justice for a declaration that the decision of 13 August 1982 was void, or alternatively for a reduction of the fine. In its reply it also claimed in the further alternative that it should be given time to pay in view of its financial position and the situation in the steel industry.

My views on those claims are as follows.

1. For the applicant the central issue is the fact that the alleged excess production was *exported to a non-member country.* It considers first that it must be borne in mind that it has not thereby prejudiced competition within the Community; on the contrary, it has been faithful to the spirit of Articles 3 and 4 of the ECSC Treaty, since Article 3 (a) thereof in particular provides that the institutions are to ensure an orderly supply to the common market *taking into account the needs of non-member countries.* Secondly, it is of the opinion that even if it was in fact not possible to leave exports out of the quota system, it in fact acted in good faith in that respect; as a small undertaking with few employees it was not aware of the

relevant provisions and for the same reason failed to notify the Commission of the export deliveries.

(a) With regard to the first point I may be very brief.

The Court of Justice has already considered on a number of occasions the question of the basic right to include exports in the rules governing quotas. Thus in its judgment in Case 119/81 [1] it emphasized the fact that it was an inevitable consequence of the application of the machinery established by Article 58 of the ECSC Treaty that the fixing of production quotas might have a restrictive effect on export opportunities (paragraph 24 of the decision). The extent to which external trade must be taken into consideration in connection with measures to be adopted under Article 58 was for the Commission to decide and therefore it was not possible to infer from Article 58 any obligation to exempt from the quota system the production which certain undertakings might prefer to channel towards export markets (paragraph 25). That was confirmed in the judgment in Case 244/81 [2], where it was also stressed that imposing production quotas would be ineffective if undertakings were to remain at liberty to export products without any supervision to non-member countries, since the effect of such exports might be not only to compromise the interests of the Community in those markets but also to deflect some of the goods back to the domestic market and thereby to jeopardize its equilibrium (paragraph 44).

Compliance with the *production* quotas is thus the sole criterion regardless of where the product is to be sold, and excess production cannot be justified, in particular by reference to the very general wording of Article 3 (a), by showing that it has been exported to non-member countries, where in fact competition with other undertakings from the Community takes place which may be distorted by failure to observe the quota rules.

(b) The applicant cites its good faith, that is to say, it relies on an excusable lack of knowledge of the law; but it ought at least to have made an effort to inform itself of the few provisions of the quota system, which had been discussed for some time before it came into effect and had been the subject of press reports.

The wording of the relevant provisions is sufficient to show that undertakings were under a duty to report their *production* (Article 10) and that it was the *production* quotas which must be adhered to (Article 7). According to Article 7 the place of delivery was relevant inasmuch as deliveries *within* the common market were restricted and according to Article 8 (4) deliveries in respect of which an undertaking could not show proof of export outside the territory of the Community were to be deemed to have been made within the common market.

Since there could thus be no doubt from the contents of the regulation as to its application to exports, the applicant ought not simply to have adopted a position favourable to itself; it should instead have sought clarification by making enquiries of the Commission. As it failed to do so it is guilty at the very

1 — Judgment of 7 July 1982 in Case 119/81 *Klöckner-Werke AG* v *Commission of the European Communities* [1982] ECR 2627.

2 — Judgment of 11 May 1983 in Case 244/81 *Klöckner-Werke AG* v *Commission of the European Communities* [1983] ECR 1451.

least of negligence, and that is sufficient reason to apply the provisions concerning pecuniary sanctions; in any case the applicant's good faith is questionable because it did not notify the Commission of its export deliveries to non-member countries, contrary to the express and clear terms of Article 11 of Decision No 2794/80, which refers to deliveries in the common market *and exports* to non-member countries.

2. Next the applicant maintains that in order to avoid excess production it closed its works in November and December 1980; in its reply it states further that as soon as it had completed its exports for Libya it closed its works in the fourth quarter of 1980, which would mean that, since the second export delivery took place on 4 December 1980 according to the applicant's evidence, it produced nothing more in December 1980. That can only be taken as an attempt to show its good faith in seeking to comply with the quota system despite commercial disadvantages, and to argue that that ought to be taken into account at least as a "mitigating circumstance".

That argument is difficult to follow, if only on the basis of the facts which the applicant itself has produced in the course of the action.

According to the report of the Commission's inspectors, the accuracy of which has not been disputed by the applicant, its production amounted in November 1980 to 2 194 tonnes and in December to 2 439 tonnes. As it produced only 3 165 tonnes in October 1980, that means that it did not exceed its quota until December 1980 and therefore it had not already exhausted its quota when Decision No 2794/80 was published. Moreover, it is clear from the evidence produced by the applicant concerning its daily production that it did not cease production either in November or immediately after the second export delivery had been completed (4 December). On the contrary, it is possible to deduce from the information produced by it that no work was carried out on 3 and 4 November, 24 to 28 November, 8 December and 22 to 31 December (thus in fact on 7 days in each case).

In those circumstances it is not possible to state that the applicant made a special effort to adhere to its production quota and there are certainly no grounds for taking that into account as a mitigating circumstance.

3. In addition Ferriere San Carlo contended, as did the applicant in Case 234/82 [1], that payment of the fine imposed on it would result in the closure of its business and in that connection it referred to its accounts for 1980 and 1981, an auditor's report examining the company's position in September 1982 and the correspondance with the Commission relating to that report.

However, as in Case 234/82, little reliance may be placed on those documents because, as I stated in the relevant part of the opinion I delivered in that case, they have no relevance to the

1 — Case 234/82 *Ferriere di Roè Volciano Spa* v *Commission of the European Communities*, in which judgment has not yet been given.

question of the legality of the decision to impose a fine. As in that case, the fact that the Commission is prepared to allow a period for payment in order to assist undertakings in difficulties and that it considers extensions to the periods laid down in a decision adopted in 1977 must suffice. It is, however, not possible to give a ruling in the present proceedings on the form an arrangement for payment by instalments by the applicant might take. The arrangement originally suggested by the applicant was rejected by the Commission and for the present the question of the provision of a bank guarantee no longer arises until judgment is given in this case. Instead it is for the Commission to consider the matter in a separate administrative procedure or to decide it in the context of enforcement proceedings if the plaintiff makes an application under Article 89 of the Rules of Procedure for the enforcement of the decision to be suspended.

4. Some further points remain to be considered, which the plaintiff raised subsequently in its reply and which relate partially to points raised in the application.

(a) The applicant draws attention to the fact that Decision No 2794/80 came into effect on 1 October 1980 although it was only published in the Official Journal on 31 October 1980, and thus it had retroactive effect. Since that is not permissible, it maintains, the production for the month of October and orders received during that period must not be taken into account and in that case it will be seen that the applicant did not in fact exceed its quota. At the very least the export order received on 7 October 1980 ought not to be taken into account inasmuch as the deliveries made in respect of that order took place before Decision No 2794/80 was made public (at the beginning of November 1980); for that reason it would be appropriate at least to reduce the amount of the fine considerably.

Once again it is not possible to accept the applicant's argument. There is already in existence a sufficiently clear body of case-law with regard to the retroactive effect of Decision No 2794/80 and the inclusion of October 1980 in the quota system.

Thus it was emphasized in the judgment in Case 258/80 [1] that it was necessary to include the month of October in the system in order to prevent undertakings from increasing their production in that month in anticipation of the reductions subsequently to be applied (paragraph 12 of the decision). In addition the decision as drafted did not in fact have retroactive effect because the undertakings were able to comply with their production quotas for the first quarter by adjusting their production in the months of November and December, thereby avoiding any infringement; as we have seen, that was the case for the applicant. Furthermore, the Commission adequately respected the legitimate expectations of those concerned by means of the communication of 11 October 1980 (Official Journal, C 264, p. 2), whereby it gave notice of its intention to include the month of October in the system of quotas, and by means of the decisions published on the

1 — Judgment of 16 February 1982 in Case 258/80 *SpA Metallurgica Rumi* v *Commission of the European Communities* [1982] ECR 487.

same date (Official Journal, L 268, p. 25) requiring the undertakings to supply information on their protection for October 1980 (paragraph 12).

Accordingly, production prior to the publication of Decision No 2794/80 and export orders accepted in October cannot be left out of account and it is therefore certainly out of the question to conclude on the basis of the alleged retroactivity that the applicant had not infringed the quota system or had infringed it to a lesser extent than that determined by the Commission.

(b) With regard to the export deliveries the applicant refers in addition to Article 14 of Decision No 2794/80, a provision which has become familiar as a result of a series of other actions. It claims that it would be possible to adjust the production quotas as regards the export deliveries with the assistance of that provision and it is of the opinion that the Commission should have considered that possibility because the applicant satisfied the conditions laid down in Article 14.

It must be said that in the Commission's administrative practice, as has been ascertained in the meantime, an increase in production quotas in respect of foreign orders was possible, and that it was certainly possible for the applicant's quotas to have been increased in that manner even though the orders in question were not direct but indirect export transactions conducted through an independent intermediary.

However, the applicant failed to submit a request to that effect at the proper time and in particular it failed to state therein that it was in exceptional difficulties as a result of the quota rules. Accordingly, there is now no real possibility of considering that sensitive question in depth and in particular of determining to what extent an increase in the quota would have been possible, since in the Commission's administrative practice the amount of the export deliveries was not the only relevant consideration.

In view of the facts which have come to light in the proceedings and the relatively generous administrative practice adopted by the Commission it might, on the one hand, be possible to state that in all probability a request made by the applicant under Article 14 of Decision No 2794/80 would have been successful; on the other hand, it might be the case that the failure to make a request under Article 14 was excusable given the novelty of the matter and the small size of the applicant undertaking. That might in turn justify a certain reduction in the amount of the fine. I am unable to make more than such general suggestions at present; I leave the determination of the amount of any reduction in the fine to the discretion of the Court.

(c) In addition the applicant in this case, too, relied on Article 58 of the ECSC Treaty, according to which fines may be imposed up to a maximum of the value of the tonnages produced in disregard of the quota system, and alleged that the fine imposed on it was excessive having regard to the demonstrable profit per tonne which it could have obtained on its excess production.

I have already said all that is necessary with regard to that question in the opinion I delivered in Case 234/82. It is clear to me that "the value of the tonnages" within the meaning of Article 58 is the market value of the products produced in excess and therefore neither

the value added in each case nor the profit made by the producer. However, since the value of the concrete reinforcing bars in question is, as the Commission has shown, several times greater than the normal amount of the fine, it is not possible to speak of an infringement of Article 58 of the ECSC Treaty.

Moreover there is no question of basing the amount of the fine on the profit made in a particular case on equitable grounds. That would not only make the system impracticable, since it is well known that profit margins vary considerably from one business or undertaking to another, but would also reduce its effectiveness considerably because undertakings operating on a small profit margin or at a loss would be able to exceed production quotas without any appreciable risk.

It is not possible, therefore, to amend the decision imposing a fine by reference to the profit which has been made or even by reference to the fact that a small part of the applicant's production was produced on behalf of third parties.

(d) Next, there remains to be examined the applicant's request to be granted a reasonable period within which to pay the fine: it proposes a period of 15 years and a rate of interest based on the rates applicable in the Benelux countries.

Again, my comments on that matter may be very brief.

According to the provisions of the contested decision the only question to be considered is whether it was correct to impose a fine, which in principle was immediately enforceable, on the applicant or whether there are grounds for amending the scope of the decision as is provided for in Article 36 of the ECSC Treaty. All other matters, including the possibility of payment by instalments, which the Commission is willing to accept, and the determination of the rate of interest applicable in such case, are matters for the Commission to decide in a further procedure which may then possibly be the subject of an application to the Court under Article 89 of the Rules of Procedure. However, until the Commission had made a final decision with regard to any relief as to payment, there is certainly no reason to comment on the matter in a judgment of the Court.

5. By way of summary, I may say that the application for annulment in full of the decision to impose a fine is unfounded and that in any case, in view of the fact that Article 14 of Decision No 2794/80 could have been applied earlier, it is not possible to consider reducing the fine by an amount to be decided by the Court at its discretion. If the Court should accept my submissions, (I regard the alternative application by the applicant to be granted a period in which to pay as inadmissible) it would seem appropriate to order each party to bear its own costs.