OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 15 NOVEMBER 1984

My Lords,

By a decision dated 24 March 1983 the Commission found that, in the fourth quarter of 1981, Usinor infringed Commission Decision No 1831/81 of 24 June 1981 (Official Journal 1981, L 180, p. 1), as amended, by exceeding the production quotas fixed in respect of the fourth quarter of 1981, for products falling within Categories Ib, Id and V, as defined in Article 1 of Decision No 1831/81, by 23 735, 15 036 and 335 tonnes respectively, and by exceeding the parts of the quotas which could be delivered on the common market for products falling within Categories Ib, Ic, Id and V by 30 912, 12 168, 18 759 and 3 767 tonnes respectively. The Commission imposed on Usinor a fine of 6 312 231 ECU.

In these proceedings Usinor initially sought the annulment of that decision. In the alternative it challenged the amount of the fine.

Subsequently, Usinor abandoned its claim for annulment and restricted itself to contesting the amount of the fine on the following grounds: (1) the Commission had wrongly applied Article 12 of Decision No 1831/81 in that it had (a) increased the fine by 10% because Usinor had allegedly exceeded its quotas in a previous quarter and (b) fined Usinor for exceeding both its production quotas and the amounts which could be delivered on the common market; (2) so far as concerns products falling within Categories Ib, Id and V, there are exceptional circumstances justifying a reduction in the fines imposed.

In these circumstances it is not necessary to deal with the objection raised by the Commission that the claim for annulment was inadmissible.

Under Article 5 of Decision No 1831/81, the Commission was required to fix each quarter for each undertaking concerned, firstly, its production quotas and, secondly, the part of those quotas which might be delivered in the common market on the basis set out in the decision.

So far as is relevant, Article 12 provides as follows:

"A fine, generally of 75 ECU for each tonne in excess, shall be imposed on any undertaking exceeding its production quotas or part of such quotas which may be delivered on the common market.

If an undertaking's production exceeds its quota by 10% or more, or if the undertaking has already exceeded its quota or quotas during one of the previous quarters, the fine may be up to double that amount per tonne. The same rules shall apply to any excess over the quantities which may be delivered on the common market."

It is common ground that, in the decision imposing the fine, the general rate of 75 ECU per tonne in excess was increased by 10% to 82.5 ECU per tonne because Usinor had exceeded its quotas during the third quarter of 1981 and had been fined therefor. A further increase of 10%, bringing the rate up of 90 ECU per tonne, was imposed where the excess came to more than 10% of the particular quota. In the categories where Usinor had exceeded both the production quota and the amount which could be delivered on the common market, the fine was calculated in respect of each item by reference to the total tonnage of whichever of the two excess amounts was the greater. The fine in respect of the lower excess amount was calculated on 20 % rather than 100 % of the excess tonnage involved.

Usinor was fined by the Commission for exceeding the quota for Category Ia products in the third quarter of 1981. It instituted proceedings before the Court to seek the annulment of the Commission decision imposing the fine, alternatively the reduction of the fine (Case 265/82 *Usinor* v *Commission).* In its judgment of 19 October 1983, the Court found that the method used by the Commission to calculate the quota was erroneous; Usinor had exceeded the quota fixed on that basis but it would not have been in breach if in fixing the quota the Commission had interpreted Decision No 1831/81 correctly. Usinor had not, however, challenged the Commission decision fixing the quota. That decision remained in being, and Usinor was in breach of it, so that the decision based on it which fixed the fine could not be annulled in its entirety. Because the decision fixing the quota should not have been made in the terms in which it was made, however, the Court cancelled or annulled the fine.

In these circumstances is Usinor to be regarded as having "exceeded its quota" during a previous quarter so that the fine may be increased under Article 12?

In my view it is not. Article 12 applies where an undertaking exceeds a quota which has been validly and lawfully fixed. If the Court sets aside the decision imposing the quota, or rules that the quota was not validly or lawfully imposed (even if the decision cannot be set aside because the applicant is out of time) then in my view the undertaking is not to be regarded as having "exceeded the quota" even though in fact it exceeded the figure specified in the purported quota.

On behalf of the Commission, it has been submitted that a breach of a quota justifies an increase if there has been even a "formal" infringement of an earlier quota. If an earlier quota has been held to be invalid, I would not regard the earlier breach as being a "formal" breach, even though there was an excess over an apparent, but invalid, quota. The object of the regulation is to ensure that valid quotas are observed and to punish the undertaking which exceeds the quota

on a second or subsequent occasion. That object is not achieved if the first quota was invalid. The Commission's contention also comes near to violating the principle that *nulla poena sine culpa* which has been regarded as applying to fines imposed under Article 58 of the ECSC Treaty, expressly in the Opinion of Mr Advocate General VerLoren van Themaat in Case 188/82 *Thyssen AG* v *Commission* (16 November 1983) and in my Opinion in Case 270/82 *Estel NV* v *Commission* (29 February 1984) and impliedly in the judgments in the *Thyssen* case and in Case 83/83 *Estel* v *Commission* (Judgment 17 May 1984).

For these reasons, it is my opinion that the Commission did not have power to increase the fine on Usinor on the ground of a second breach. It does not matter that the invalidity of the earlier quotas was established by a judgment of the Court delivered after the making of the decision challenged in this action.

In the alternative, it would be right, in view of the circumstances, for the Court, in the exercise of its jurisdiction under Article 36 of the ECSC Treaty, to delete from the fine imposed by the Commission the amount applicable to the repetition of a breach of the quota.

As a result, it is not necessary to consider Usinor's alternative argument that Article 12 allows an increase in the fine only where the quota for the same category of product was exceeded in a previous quarter. If I had come to the opposite conclusion on the previous point, I would not have considered that the wording of Article 12 gives support for this interpretation. An increase in the fine imposed, even where the previous infringement concerned products in a different category, is in accordance with the wording and the objectives of Article 12.

Usinor has relied on certain statements made by officials of the Commission, apparently to the effect that fines would be increased for recidivism only where products in the same category were involved. These statements were disavowed in a letter addressed to the European Confederation of Iron and Steel Industries ("Eurofer"), dated 13 April 1983, from a Mr Duprat of Directorate E of the Commission's Directorate-General III.

In my Opinion in Case 270/82 *Estel* v *Commission*, I took the view that the formal statement of the Commission's position regarding fines is to be found in Article 12. Informal statements made by officials of the Commission cannot alter that position.

In the absence of a statement by an official as to the exercise of a discretion, which creates a legitimate expectation or an estoppel, statements cannot bind the Commission not to apply the law. I do not consider that anything in this case would have prevented the Commission from applying the double penalty for breaches of quota in respect of two different categories of products, had there been an earlier breach of a valid quota.

Usinor then says that there cannot here be a fine for breaches both of the

production quota and of the limit fixed for delivery on the common market.

In Case 270/82 *Estel* v *Commission* (at paragraphs 27 and 28) the Court rejected the argument that the Commission cannot impose a fine in respect of both a failure to observe a production quota and the exceeding of the amount which may be delivered on the common market. Counsel for Usinor sought to distinguish that case on two grounds. The first is based on the premise that, in substance, the system set up by Decision No 1831/81 imposes a quota on deliveries on the common market and a quota on deliveries to third countries. Where, as in the present case, the excess over the quantities which may be delivered on the common market is higher than the excess over the production quota for the same category of products, the total amount of the latter has been delivered on the common market and there is, in effect, only one infringement. In my view this argument is based on a misconception. Article 58 of the EEC Treaty authorizes the imposition of production quotas in the event of a decline in demand. As point 5 of the preamble to Decision No 1831/81 shows, the restriction on deliveries in the common market was intended to restore the balance of supply and demand by preventing undertakings from concentrating too much on the common market. This does not mean that, in substance, there is a quota for deliveries on the common market and a quota for deliveries to third countries. As paragraph 27 of the judgment in the *Estel* case states, undertakings lie under two distinct obligations, to respect the production quotas and not to exceed the quantities which can be delivered on the common market. A failure to respect both obligations constitutes two equally distinct infringements which may be the subject of a fine.

Secondly, counsel for Usinor relies on assurances said to have been given by certain Commission officials to Eurofer that no "double penalty" would be imposed. The same argument was raised in the *Estel* case and should, in my view, be rejected in this case. Commission officials cannot bind the Commission not to apply Community law as properly understood, at any rate in the absence of circumstances creating an estoppel which I do not consider can be shown in this case.

Usinor raises a number of criticisms of detail.

In its decision, the Commission found that Usinor had exceeded the production quota for Category Ib products by 23 735 tonnes and the part of the quota which could be delivered on the common market by 30 912 tonnes. Usinor disputes this only in respect of 4 034 tonnes which comprised Category Ib products intended to be transformed into Category Ic products by Usinor itself. Under Article 1 of Decision No 1831/81, cold- or hot-rolled sheet for the production of derived products of

Categories Ic and Id only fall within Category Ib if they are transformed into derived products in other Community undertakings; where the sheet is transformed into derived products by the same undertaking which manufactures the sheet, it falls within Categories Ic or Id, as the case may be, and not Ib.

Usinor says that in the course of the fourth quarter of 1981, it encountered unspecified technical difficulties in galvanizing the sheet and was forced to deliver it to other undertakings, transferring to them part of its Category 1c production quotas.

The Commission accepts that the steel as first manufactured was intended for the production of Category Ic products and that unforeseen events prevented Usinor from galvanizing them itself. On the other hand, I am not satisfied on the evidence that Usinor could not have taken other steps to cope with the problem as e. g. by obtaining the cession of Category Ib quotas from other undertakings, or making arrangements with another undertaking to make both the Ib and the derived Ic products in return for a similar cession in a following quarter. The evidence given of the difficulties I find tenuous. Even though in the event these products fall within Category Ib, and were the subject of a transfer of part of Usinor's Category Ic quota, these consequences seem to me to flow from Usinor's failure to make appropriate arrangements. The result is said to be harsh but it seems to me that the wording of the relevant Article is clear and I would not accept Usinor's argument that the Commission was guilty of delay. The scheme must be strictly applied not only by the Commission, as Usinor argues, but also by Usinor.

Secondly, exceptional circumstances are relied on to justify reducing the fine imposed in respect of Category 1d products. These are said to arise from an alleged increase in demand for "monogal", which is a type of galvanized steel sheet. According to Usinor, production of monogal rose in the course of 1981 from 5 700 to 13 800 tonnes. In his Opinion in Case 10/83 *Metalgoi* v *Commission*, 1 March 1984, Mr Advocate General VerLoren van Themaat seemed prepared to admit that a considerable increase in sales may justify reducing a fine, at least where a new market has been opened up and the sales caused no harm to competitors. This, however, presupposes a net increase in demand. In the present case, there is no indication that the Category Id quotas were insufficient having regard to total demands and it does not seem on all the evidence that the Commission was apprised that monogal created a problem in relation to quotas. Usinor's argument that the overriding justification is the need to satisfy customers seems to me untenable in the context of the quota

system. The fact that exchange of quotas was made possible by Decision No 1619/83 of 8 June 1983 (Official Journal L 159, p. 56) does not seem to me to assist Usinor in this case. As a result, it is my opinion that the circumstances relied on do not justify reducing the fine.

So far as Category V products are concerned, Usinor originally relied on the unlawfulness of Commission Decision No 1832/81 of 3 July 1981 (Official Journal 1981, L 184, p. 1), which extended the quota system to Category V products and amended Article 14 of Decision No 1831/81. This enables the reference production of an undertaking to be adjusted if certain conditions are fulfilled. Usinor's case was that the amendment of Article 14 led to Usinor being given a smaller quota for Category V products. Before the hearing, Usinor abandoned its claim that Decision No 1832/81 was unlawful but, at the hearing, relied on its doubts concerning the lawfulness of the decision as an exceptional circumstance justifying a reduction in the fine, referring in particular to Cases 140, 146, 221 and 226/82 *Walzstahl-Vereinigung and Thyssen AG* v *Commission*, 21 February 1984, and its arguments in Case 103/83 *Usinor* v *Commission* and Case 151/83 *Alpa* v *Commission* (judgments 11. 10. 1984). In the *Walzstahl* case the Court annulled a later Commission decision introducing a further amendment of Article 14 on grounds which, in my view, do not apply to the version of Article 14 in force during the fourth quarter of 1981. Cases 103/83 and 151/83 concerned Article 14 of Commission Decision No 1696/82 of 30 June 1982 (Official Journal 1982, L 191, p. 1) and the argument that that provision is unlawful should be rejected. In the circumstances, it is my opinion that no justification has been shown for reducing the fine in the present case on this basis.

In the reply and at the hearing counsel for Usinor also requested an order that the Commission pay the costs incurred by Usinor in providing a bank guarantee as security for payment of the fine pending judgment in the action. In a letter dated 30 March 1983, the Commission had informed Usinor that, if it challenged the Decision imposing the fine before the Court, the Commission would proceed to recover 70% of the fine (on the ground that Usinor had been fined once already) but would take no action to recover the remainder before judgment if Usinor produced a bank guarantee covering it. On 5 July 1983, in the proceedings for interim relief, the President of the Court suspended the operation of the decision imposing the fine until 30 days after the date of notification to the parties of the judgment in Case 265/82, on condition that Usinor provided a bank guarantee covering the total amount of the fine. The Court has been told that, after the judgment in Case 265/82, the Commission did not attempt to recover 70% of the fine.

As a result, the necessity for Usinor to provide a bank guarantee covering the total amount of the fine arose after the commencement of proceedings on 3 May 1983 and a claim in respect of the costs incurred could not, therefore, have been made before lodgment of the reply. The Commission has had an adequate opportunity to answer the claim in the rejoinder and at the hearing. For these reasons, there are, in my view, no grounds for considering the claim to be inadmissible under Article 42 (2) of the Rules of Procedure. On the other hand, it should not, in my opinion, be upheld. Usinor provided the guarantee, pursuant to an order made by the President, in return for suspension of the operation of the decision challenged in this action. The Commission would ordinarily have been entitled to enforce the decision whether or not Usinor had been guilty of recidivism.

For these reasons it is my opinion that the fine imposed by the Commission should be reduced by the amount reflecting the 10% increase imposed for a second breach, namely by 550 701 ECU from 6 312 231 to 5 761 530. The remaining claims should be dismissed. It seems to me reasonable that each party should bear its own costs, including those incurred in the proceedings for interim relief.