3. The power conferred on the Commission by Article 58 (4) of the ECSC Treaty and by the decisions adopted for its implementation to impose fines of 75 ECU per tonne where quotas have been exceeded does not exclude all discretion in the matter of fines. On the contrary, the Commission is obliged to vary the amount of the fines where the circumstances of the infringement or the exceptional situation in which an undertaking finds itself justify the application of a rate other than that of 75 ECU which is generally applied. The structure of the undertaking or its small average contribution per tonne of steel produced cannot justify a reduction of that rate unless they serve as evidence establishing the existence of a circumstance mitigating the infringement or of an exceptional situation.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 14 February 1985 *

Mr President,
Members of the Court,

I — Introductory remarks

The significance of the present case lies in my opinion chiefly in the parties' arguments arising out of the applicant's third submission as regards the Commission's policy concerning the rate of fines. As the Court is aware, as part of its policy on fines where quotas are exceeded, the Commission applies a standard rate which is based on the average costs of standard integrated companies. As the Commission has again explained in detail on pages 12 and 13 of its defence, the purpose of that standard rate is to ensure that it is not in undertakings' interests to exceed their quotas. However, in its third submission the applicant argues cogently that that approach and the calculation of the rate of the fine which is based thereon does not always take away the benefit of excess production in the case of integrated companies. The applicant also contends that the approach in question leads to discrimination against undertakings specialized in re-rolling semi- manufactured goods or scrap in respect of which the added value is lower than in the case of products manufactured by integrated companies. As a result of that approach, such undertakings, including the applicant, are penalized with excessive severity by the application of the standard rate. In my view that consequence stems almost by definition from the approach adopted by the Commission. That approach therefore clearly raises a fundamental problem for the Court on grounds of fairness and in the light of the principles of equal treatment and proportionality. To a certain extent that problem may be compared to a similar problem which at one time played a decisive role in connection with the harmonization of the various systems of turnover tax. Discrimination against specialized undertakings by comparison with integrated undertakings as a result of the cumulative taxation imposed on each link in the chain of production in respect of the full value of the product sold by it (irrespective of the much smaller added value in the case of specialized undertakings) was the principal

* Translated from the Dutch.

reason for the adoption of the system of value-added tax as the starting point for the harmonization of the systems of turnover tax. In my view there are cogent reasons for maintaining that a system involving the imposition of fines on undertakings for exceeding their quotas that favours integrated undertakings (and at least in the case of a first infringement, leaves the undertaking with a substantial benefit) and at the same time places all specialized undertakings in respect of whose products the added value is lower at a disadvantage (as a resuult of its more than prohibitive effect) must also be regarded as inequitable and, in particular, as discriminatory. I shall therefore consider this point in detail in connection with the applicant's third submission.

That point, on which a number of pertinent questions were also raised at the sitting by the judge-rapporteur, must of course be considered in detail in connection with the relevant provisions and the facts of the case. Partly in order to make as clear as possible the relative importance of that point inrelation to the remainder of the applicant's submissions, I consider it appropriate in the present case to depart from my usual practice in that regard and to incorporate in my Opinion virtually the entire Report for the Hearing (after re-numbering the various sections), including the conclusions and the submissions and arguments of the parties. Using that approach, my examination of the first, second and fourth submissions can be relatively brief.

I propose to omit from the Report for the Hearing only the information concerning the course of the procedure before the Court since it is less relevant for the purposes of this Opinion. I shall, however, include the full text of Article 58 (4) and Article 36 of the ECSC Treaty in that part of my Opinion. In my appraisal I also intend, in so far as it is necessary, to consider in greater detail certain arguments in the written observations which are only briefly set out in the Report for the Hearing, as well as certain arguments which were put forward during the oral procedure.

II — Relevant provisions and facts of the case

1. *Relevant provisions*

(a) Confronted with a manifest crisis in the steel market within the meaning of Article 58 of the ECSC Treaty, by Decision No 2794/ECSC of 31 October 1980 (Official Journal 1980, L 291, p. 1) the Commission established a system of steel production quotas for undertakings in the iron and steel industry which was in force from 1 October 1980 until 30 June 1981.

(b) In view of the fact that towards the middle of 1981 the European iron and steel industry was still in a period of manifest crisis, by Decision No 1831/81/ECSC of 24 June 1981 (Official Journal 1981, L 180, p. 1), amended by Decisions Nos 1832/81/ECSC of 3 July 1981 (Official Journal 1980, L 184, p. 1), 2804/81/ECSC of 23 September 1981 (Official Journal 1981, L 278, p. 1) and 533/82/ECSC of 3 March 1982 (Official Journal 1982, L 65, p. 6), the Commission set up for undertakings in the iron and steel industry a new system of production quotas in respect of certain products and a monitoring system. That decision was also based on Articles 47 and 58 of the ECSC Treaty and was applicable from 1 July 1981 to 30 June 1982.

Article 5 of Decision No 1831/81 provides that the Commission is to fix each quarter for each undertaking its production quotas and the part of such quotas which may be delivered in the common market, on the basis of the reference production and the reference quantities of the undertaking concerned and by application of certain abatement rates to such production and quantities.

Article 7 (a) of Decision No 1831/81, as amended by Article 1 (5) of Decision No 1832/81, provides that:

'The reference production for Categories V and VI shall be calculated as follows:

— account shall be taken of the quotas allocated by the Commission during the period of application of Decision No 2794/80/ECSC, including all the adjustments granted for the products in Group IV, as defined in Article 2 of the above-mentioned decision, with the exception of Category IV (wire rod) of this decision,

— these quotas shall be used to reconstitute the relevant reference production on the basis of the abatement rates in force during the three quarters in question,

...'

In addition, Article 12 of Decision No 1831/81 provides that:

'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.

This amount shall be increased by 1% for each month by which payment is delayed, with effect from the date fixed in the decision imposing the fine. A month started shall count as a whole month.'

However, to be properly understood that provision must be read in conjunction with Article 58 (4) and Article 36 of the ECSC Treaty.

Article 58 (4) of the ECSC Treaty provides as follows:

'The High Authority may impose upon undertakings which do not comply with decisions taken by it under this Article fines not exceeding the value of the tonnages produced in disregard thereof.'

Article 36 provides as follows:

'Before imposing a pecuniary sanction or ordering a periodic penalty payment as provided for in this Treaty, the High Authority must give the party concerned the opportunity to submit its comments.

The Court shall have unlimited jurisdiction in appeals against pecuniary sanctions and periodic penalty payments imposed under this Treaty.

In support of its appeal, a party may, under the same conditions as in the first paragraph of Article 33 of this Treaty, contest the legality of the decision or recommendation which that party is alleged not to have observed.'

Finally, Article 14 of Decision No 1831/81, as amended in Article 1 (8) of Decision No 1832/81, provides that:

'If, by virtue of the scale of the abatement rates imposed in respect of a given quarter, the quota system creates exceptional difficulties for an undertaking, the Commission shall make suitable adjustments to the reference production for the categories in question, provided that the undertaking has made an application to this effect during the first month of the relevant quarter in the following instances:

— the total reference production for Categories Ia to Id comes to less than 1 000 000 tonnes a year and at least

75% of the figures are based on more than 20%, or

— the total reference production for Categories V and VI comes to less than 60 000 tonnes and the abatement rate exceeds 20%.'

2. *Facts*

By letters of 20 August 1981 and 28 October 1981 the Commission allocated to the applicant its production quotas respectively for the third (3 604 tonnes) and the fourth (3 912 tonnes) quarters of 1981. The applicant is not able to give the exact date on which the letter dated 20 August 1981 was received, because that letter was addressed to the applicant's registered office. It must be assumed that there was some delay before the applicant received it.

The applicant does not deny that it exceeded the production quotas for Categories V and VI products by 2 300 tonnes for the third quarter of 1981 and by 3 263 tonnes for the fourth quarter of 1981, and that it exceeded the part of its quota which could be delivered on the common market for the fourth quarter of 1981 by 697 tonnes (the amount allocated was 2 944 tonnes).

By letter of 15 February 1983, sent pursuant to Article 36 of the ECSC Treaty, the Commission accused Queenborough Rolling Mill Company Limited (hereinafter referred to as 'Queenborough') of having exceeded its production quota for the third and fourth quarters of 1981 and the part of its quota which can be delivered on the common market for the fourth quarter of 1981. In reply to that letter, Queenborough stated in letters dated 23 February 1983, 25 April 1983 and 9 June 1983 and at a hearing that it did not deny that it had exceeded those quotas; however it set out the reasons which led it to exceed the quotas allocated, in particular the existence of a large stock of the product in question and its uncertainty as to whether the system of production quotas applied to it. The Commission took the view that Queenborough's arguments were inadequate and, by a decision dated 26 January 1984, imposed on it a fine of 491 988 ECU, or UKL 280 708.

This action is directed against that decision.

III — Conclusions of the parties

Pursuant to Article 36 of the ECSC Treaty, Queenborough brought this action by application which was registered at the Court on 12 March 1984.

The *applicant* claims that the Court should:

(1) Declare the contested decision of 26 January 1984 void;

(2) Alternatively, cancel or reduce the fine imposed by the decision of 26 January 1984;

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

The *Commission* contends that the Court should:

(1) Dismiss the application;

(2) Order the applicant to pay the costs.

IV — Submissions and arguments of the parties

1. *The applicant's knowledge of the quota system*

By way of introduction the *applicant* gives a description of itself. It points out that it is a small company with a turnover of approximately UKL 4.5 million (7.65 million ECU) *per annum*. Its main activity is the re-rolling of rails no longer required by British Railways into bars which may be used as

concrete-reinforcing bars. The applicant states that, as it is the producer of a single product, it does not have the possibility of switching production facilities to non-quota products or of balancing production between various products. As a small undertaking, it considered in 1981 that the crisis measures imposed by the Commission were adopted primarily to apply to the major groups and not to small re-rollers and monoproducers which produce essentially from scrap. Queenborough maintains that its directors held the sincere view that the undertaking was outside the scope of the ECSC Treaty and of the crisis measures because it was not producing new steel rolled products and could not, therefore, be affecting Community steel production.

The *Commission*, also by way of introduction, draws attention to the fact that until early 1982 relations between Queenborough and the Commission were characterized by a conscious, considered refusal on Queenborough's part to submit to the rules of the ECSC Treaty. The Commission points to the dispute between Queenborough and the Commission that began in August 1979 and continued until the adoption of the Commission decision of 13 January 1982 obliging Queenborough to declare its leviable production and to pay the sums due. Queenborough accepted that decision. Contrary to the impression given by Queenborough that it acted mistakenly but in good faith, in the Commission's view Queenborough wilfully chose to ignore the rules of the ECSC Treaty and the system of quotas. In reply to that allegation, the *applicant* states that until the adoption of the decision of 13 February 1982 it maintained that it was outside the scope of both the levy and the quota system. That position was a result of Queenborough's imperfect understanding of Decision No 1831/81, which, moreover, led to quotas being lost.

2. *Submissions*

The applicant puts forward four submissions:

2.1. *First submission*: late receipt of the letter fixing the quotas for the third quarter of 1981

The first submission is subdivided into two parts.

2.1.1. *First part*: the impossibility of complying with the quotas allocated.

The *applicant* points out in the first place that it received the letter establishing the quota for the third quarter of 1981 when two thirds of the quarter had already elapsed. As the applicant's mill is new and operates with relatively restricted financial resources, with new customers to please, it was not in a position to reduce its production on a temporary basis, when a large part of the quarter concerned had already elapsed. Moreover, Queenborough did not have a number of diffeent production possibilities. Since orders were very large in relation to the size of the company and, in addition, some of its plant was still being commissioned, it was in practice impossible to cease production and to rectify the situation. A further factor was that the mill was closed for two weeks' vacation in August 1981. In view of the fact that the average monthly production is at least 2 300 tonnes, that the deliveries ordered before 1 September 1981 together with the deliveries for regular customers amounted to 4 238 tonnes for the third quarter and that Queenborough had 1 900 tonnes in stock at the end of August, the company was forced to produce 2 338 tonnes (4 238 less 1 900 tonnes). In fact

Queenborough produced 2 516 tonnes in September, which shows that it is only in respect of the production of 178 tonnes (2 516 tonnes less 2 338 tonnes) that there is no excuse.

The *Commission* rejects that part of the first submission as unfounded. It points out, in the first place, that the letter allocating the quota for the third quarter was dispatched on 20 August 1981. Although the Commission takes the view that the date of receipt at Queenborough's registered office is the date which counts (therefore on or about 24 August), it admitted in its contested decision that the fact that the letter was received later than usual could have contributed to the excess production. The Commission then considers to what extent the excess production could be said to be due to that delay. In view of the fact that Queenborough also exceeded by a considerable amount its quota for the fourth quarter and that it did not reorganize production control until early 1982, the Commission concludes that the late receipt of the letter was not the cause of the excess production. However, in imposing a fine for the third quarter it decided to reduce the normal rate by 50%, which amounts to 'exempting' 1 165 tonnes of unlawful excess production.

Finally, the reasons given by Queenborough for having exceeded the quota, in particular deliveries to very regular customers and the quantity of 'booked' deliveries to be made after 1 September, cannot, in the Commission's view, constitute a defence to the illegality of the over-production. The restrictions imposed by the quotas are acts of public law and as such take precedence over any conflicting contractual obligations.

2.1.2. *Second part*: unforeseeability of the new quota system

Under this part of it submission, the *applicant* claims that, in its view, the crisis measures were not adopted in order to be applied to small re-rollers and monoproducers. It was not possible for Queenborough, as a small undertaking, either to have anticipated in the summer of 1981 the new and complicated system of quotas introduced by Decision No 1831/81 or to have studied the Commission's plans and measures. Queenborough was therefore obliged to await receipt of the formal letter from the Commission setting forth the particular conditions imposed on it with respect of the third quarter of 1981. When Queenborough finally received the letter establishing the quota, there was no longer any possibility whatsoever of complying with it.

The *Commission* draws attention in the first place to the judgments of the Court of 16 February 1982 (Case 276/80 *Padana* [1982] ECR 517, and Joined Cases 39, 43, 85 and 88/81 *Halyvourgiki Helleniki* [1982] ECR 593) and of 3 March 1982 (Case 14/81 *Alpha Steel* [1982] ECR 749), according to which even a small undertaking which is a re-roller and a monoproducer is subject to all the rules of the system of production quotas.

Secondly, the Commission considers that Decision No 1831/81 provided Queenborough with all the necessary information to calculate its own quotas, which was not a difficult task because the figures for its reference under Decision No 2794/80 were already available to Queenborough and no adjustments had been made to those figures. According to the Commission's calculations, and taking into account the excess production of 1 165 tonnes disregarded by the Commission, in so far as it adopted a fine reduced by 50%, Queenborough could have produced 1 351 tonnes in September 1981. That limit does not seem unreasonable to the Commission when compared to Queenborough's previous monthly average of 1 709 tonnes.

2.2. *Second submission*: exceptional difficulties encountered during the third and fourth quarter of 1981

The *applicant* bases its second submission on the fact that it encountered exceptional difficulties within the meaning of Article 14 of Decision No 1831/81 during the third and fourth quarters of 1981. During those two quarters Queenborough operated under exactly the same conditions as those prevailing in the first and second quarters of 1982, in respect of which the Commission agreed to apply Article 14. Although the Commission refused, on strictly formal grounds, to adjust Queenborough's quotas for the third and fourth quarters of 1981, Queenborough takes the view that, in fixing the amount of the fine, the Commission should have acknowledged the difficulties encountered by Queenborough. In addition, the Commission promised on 16 May 1983 that the request for adjustment, despite being late, would be examined with the greatest care; the Commission apparently failed to fulfil its promise. Nevertheless, the applicant does not challenge the legality of either the quotas for the third and fourth quarters or Article 14 of Decision No 1831/81 or the individual decision of 22 November 1983 refusing to make adjustments under Article 14 for the relevant period.

In reply to that submission, the *Commission* points out that the Court has held, *inter alia*, in its judgment of 16 February 1984 (Case 76/83 *Boël* [1984] ECR 859), that individual decisions which have previously not been contested and which fix, adjust or refuse to adjust production quotas cannot be challenged in an application requesting the Court to declare void a decision imposing a fine. The Commission further points out that Article 14 is not relevant with regard to the calculation of fines, as is clear also from the case-law of the Court and, in particular, from its judgment of 12 July 1984 (Case 81/83 *Busseni* [1984] ECR 2951). The applicant's submission concerning Article 14 of Decision No 1831/81 cannot therefore justify a reduction in the amount of the fine imposed.

2.3. *Third submission*: erroneous calculation of the fine for the third and fourth quarters of 1981

The *applicant* bases the third submission on the principle of non-discrimination. The consequences of a fine of 75 ECU for each excess tonne imposed on undertakings which exceed their quotas are proportionally much greater for a re-roller than for an integrated company. Consequently, in the applicant's view, the Commission should have taken into consideration the objective differences between one type of steel producer and other types. It is clear from a reply given by the Commission in Case 234/82 (judgment of 30 November 1983, *Ferriere di Roè Volciano* [1983] ECR 3921) that the figure of 75 ECU was fixed on the basis of an average integrated undertaking and in such a way as to deprive integrated undertakings of the benefit of excess production. It would have been proper and simple for the Commission to distinguish between the three main types of producers (re-rollers, arc-furnace steelmakers and integrated undertakings), and to establish a 'standard' fine for each type. In order to show the disadvantages and harm which that identical treatment causes to re-rollers, the applicant has drawn up a comparative table, according to which an integrated undertaking has an average contribution per tonne of steel (calculated on the basis of the net selling price less production costs) of UKL 120, whilst a re-roller's contribution amounts to only UKL 35. Therefore an

identical fine of 75 ECU (UKL 43) leaves the integrated undertaking with a positive balance of UKL 77 whilst the re-roller is faced with a negative balance of UKL 8. It is neither fair nor consistent with the principle of equality to fix the amount of the fine on a uniform basis.

The *Commission* replies in the first place that Article 12 of Decision No 1831/81 provides for the possibility of a fine of up to double the figure of 75 ECU, if the undertaking exceeds its quota by 10% or more or if the undertaking has already exceeded its quota or quotas in one of the preceding quarters. The Court expressly acknowledged the legality of that provision in its judgment of 18 October 1983 (Case 179/82 *Lucchini* [1983] ECR 3083). In the light of that decision, Queenborough's submission can succeed only if its position is special or exceptional, which is not the case. Moreover, the same argument has already been advanced before the Court in Cases 234/82 (*Roè Volciano* [1983] ECR 3921) and 235/82 (*San Carlo* [1983] ECR 3949) in which judgments were given on 30 November 1983. As the Commission pointed out in those cases, the applicant's proposal that a distinction be made, as regards the fine imposed, between the different categories of producers is not provided for anywhere in the ECSC Treaty; moreover it is impracticable. If it were adopted there would be no end to claims to apply further distinctions.

Finally, the Commission considers that in its judgment in *San Carlo* the Court has already confirmed that Article 58 of the ECSC Treaty does not provide for the fixing of the fine on the basis of value added (or the average contribution or average profit). Thus the Court stated that that provision is 'based on the notion of the value of the tonnages produced in disregard of the quota, not the profit realized in respect of such production'.

2.4. *Fourth submission*: erroneous calculation of the fine imposed for the fourth quarter of 1981

The *applicant* bases this submission on the fact that the 25% increase in the fine imposed for the fourth quarter on the ground that the applicant had exceeded its quota during the third quarter is unfair because in respect of the third quarter the Commission has accepted that Queenborough was placed in an exceptional situation justifying a rate 50% lower than the normal rate. The Commission should have taken that exceptional situation into consideration when relying on that excess to increase the fine for exceeding the quota in the next quarter. In this case, therefore, the Commission should have increased the normal fine by 12.5%, not by 25%. Queenborough therefore takes the view that if the excess production for the third quarter had been entirely justified, the Commission could not have increased the fine for the fourth quarter. Consequently, if the first excess was only partly justified (which the Commission accepts), the extent to which the Commission took that infringement into account should have been limited accordingly.

In reply to that submission, the *Commission* refers to the wording of Article 12 of Decision No 1831/81, which provides for an increase in the standard rate of fine; it also emphasizes that the number of times that an excess is produced during the period when production quotas apply must be taken into account. Since it is not disputed that Queenborough exceeded its quota for the third quarter, the excess production for the fourth quarter constitutes a second

infringement despite the fact that the Commission agreed to treat the infringement committed in the third quarter more favourably. Further, the circumstances which gave rise to that favourable treatment related only to the third quarter and there was no reason for them to be taken into consideration again in relation to the fourth quarter. It is out of the question to make a concession twice, once for the third quarter and once for the fourth quarter, in respect of a single extenuating circumstance. Lastly, the Commission can see nothing illegal in applying the higher rate of 25%, in view of the fact that Article 12 of Decision No 1831/81 envisages that the Commission may impose an increase of up to 100%.

V — Appraisal of the submissions and conclusions

1. *First submission*: impossibility of complying with the quotas allocated

In my view, the Commission's defence — which I summarized earlier — relating to the first part of the first submission is valid. Since the applicant itself maintains that its mill was closed for two weeks in August 1981, it operated in ignorance of its quota for only half of the third quarter as a result of the belated notification of its quota. By reducing the fine for the excess produced in that quarter by 50%, the Commission took due account of that factor. Moreover, I agree with the Commission's view, based on the reasons given by it, that it is self-evident that the conclusion of delivery contracts cannot justify production in excess of the quota.

The first submission must therefore be rejected on those grounds alone. The same conclusion must also be drawn as regards the second part of the first submission even if it is open to doubt whether, in the absence of notification, the applicant could or should have calculated its quota itself, as the Commission maintains. By the end of August at the latest the applicant was apprised of the quota allocated to it and consequently of how much more it could produce in the third quarter.

2. *Second submission*

In its second submission the applicant relies on the exceptional difficulties which it claims to have experienced during the third and fourth quarters of 1981. The applicant is apparently referring to exceptional difficulties within the meaning of Article 14 of Decision No 1831/81. The Commission did apply Article 14 in respect of the first and second quarters of 1982, but not in respect of the third quarter of 1981 on formal grounds (belated submission of the application) and the applicant contends that the Commission should, for the reasons which I mentioned earlier, have taken account of those difficulties in fixing the amount of the fine.

However, the applicant has already expressly stated in its written observations that it does not contest (under the third paragraph of Article 36 of the ECSC Treaty) the legality of either the decision allocating the quotas for the third and fourth quarters or Article 14 of Decision No 1831/81 or the individual decision of 22 November 1983 refusing to make adjustments under Article 14 for the relevant period. This was confirmed by the applicant at the hearing.

In those circumstances, the second submission must also be rejected for the reasons given by the Commission.

3. *Third submission*: erroneous calculation of the fine for the third and fourth quarters of 1981 and alleged breach of the principle of equal treatment

3.1. *The applicant's point of view*

As I observed in my introductory remarks, the applicant contends in its third

submission that a fine of 75 ECU for each excess tonne imposed on a standard integrated company discriminates against the applicant and other undertakings engaged in re-rolling semi-manufactured products. In paragraph 24 of its application, Queenborough expounded its view, calculating that the rate of the fine imposed on integrated undertakings leaves them with a net average benefit of UKL 77 per tonne, whilst penalizing undertakings engaged in re-rolling semi-manufactured products by leaving them with a deficit of UKL 8 on the 'value produced'. [1] In that connection 'value produced' means the net selling price less the variable costs per tonne. The information contained in the application is further clarified in the annex to the applicant's reply. There it is stated, *inter alia*, that the calculation of the 'value produced' includes, apart from the profit, also the contribution towards covering fixed costs. In the reply itself, the applicant contends that it based its calculations on the fundamental criterion which the Commission itself applied in Case 234/82 (*Ferriere di Roè Volciano* v *Commission* [1983] ECR 3921, at p. 3933: judgment delivered by the Court on 30 November 1983). The applicant refers in particular to the following statement by the Commission cited in that judgment: 'the figure of 75 ECU was fixed on the basis of an "average integrated undertaking" and the intention is to deprive it [by this means] of the benefit brought about by the reduction in its fixed costs as a result of each tonne produced in excess of the quota' (parentheses added).

On the basis of the calculations set out in paragraph 24 of its application, Queenborough contends that the Commission should be able to fix fines at different rates, without encountering any administrative problems in practice, for the three categories of producers referred to in that paragraph (see in that regard also paragraph 19 of the reply).

3.2. *The Commission's defence*

In its defence the Commission emphasizes in the first place that in paragraph 7 of its decision in Case 179/82 (judgment of 19 October 1983, *Lucchini* [1983] ECR 3083) the Court expressly accepted the standard rate of fine, save in exceptional cases where the application of a different rate was justified. The applicant's suggestion that three different rates should be applied for three types of producers is, in the Commission's view, inconsistent with the expression 'exceptional cases'. Secondly, the Commission recalls that in the *Roè Volciano* case, referred to earlier, it gave a full explanation of the manner in which the standard rate is fixed. That explanation was as follows:

'The rules for the calculation of the fines are the same for steel producers and for those operators who simply carry out transformation work. Indeed, the objective of the quota system is to control production irrespective of the means used or the different stages involved in such production.

The figure of 75 ECU per tonne was established so that the companies could have no interest in exceeding their quotas; not only should they be prevented from making a profit on the excess tonnage, but also they should not be incited to reduce their losses by such breaches. Further, the 75 ECU

1 — Like the Commission, the applicant avoided using the expression 'added value' in its submissions. The criterion used by both parties is in my view best rendered by the expression 'value produced' which, apart from any profit, also includes the contribution towards covering fixed costs. The applicant itself uses the therm 'contribution'. The extent to which that term is really at variance with the expression 'added value' was not made clear during the proceedings.

figure was fixed by taking as a basis a 'standard integrated company' which would thus lose the benefit of any reduction in its fixed costs contributed by the excess tonnage.

This justification does not, however, mean that each fine, in order to be valid, should be proportional to the profit made by the undertaking being fined. Nor should the amount of the fine be limited to the value added by the transformation work carried out.

Indeed not only does the value added depend on many different factors and vary with each product transformed, but also there are not only two types of undertakings (producers and transformers) but a whole series of different types (indeed, in the present case QRM proposes *three* types!).

In the Commission's view, the rule establishing a fixed general amount of the fine raises the question whether the fine is proportionate to the breach that has been committed.

The Commission believes that every tonne produced in excess of the quotas helps to upset the balance to be established between supply and demand and is thus in direct conflict with the goals of the quota system.

Further, the transformer company (in this case, re-roller) is fully aware of the risk of a fine, the amount of which he is clearly informed of in advance by Article 9 of the decision (in this case Article 12 of Decision No 1831).

It should be added that Article 58 of the Treaty fixes a ceiling of the value of the tonnage produced in breach *irrespective of* the methods used to effect such production and thus *without reference* to the amount of the value added by the transformer.'

Thirdly, the Commission is unable to find in the ECSC Treaty any legal basis for the applicant's proposal which, moreover, it regards as unworkable in practice. The Commission explains this first by reference to the profit level which varies from one undertaking to another and, secondly, by reference to the likelihood that the adoption of the applicant's proposal would lead to claims for further distinctions.

Fourthly, the Commission contends that any link between the rate of the fine and the added value was rejected by the Court in paragraph 35 of the decision in Case 235/82 (judgment of 30 November 1983, *San Carlo* [1983] ECR 3949 at p. 3971). The relevant passage in that paragraph reads as follows: 'The Court observes, first, that [the] aforementioned provisions of Article 58 of the ECSC Treaty are based on the notion of the value of the tonnages produced in disregard of the quota, not the profit realized in respect of such production.' [2]

In its rejoinder the Commission adds that the term 'contribution' which is used by the applicant appears to be closely connected with the expression 'added value' but that in the Treaty the term 'value' is used on its own. The Commission re-affirms that any other rule is unworkable in practice and provides further examples by way of illustration.

At the sitting the Commission added to that defence the further argument that a

2 — In that connection it is noteworthy that, according to paragraph 34 of that decision, San Carlo took the view 'that the amount of the fine should not exceed the profit on the excess tonnage'. San Carlo therefore advocated the adoption of a lower criterion for fixing fines than that corresponding to the expression 'added value' since even loss-making undertakings realize a positive added value.

distinction as regards the fine, made according to the profit level or the added value or what the applicant refers to as the 'contribution', would lead to evasion of the quota system. Producers of semi-manufactured products falling outside the scope of that system would thus be able, by supplying a re-roller coming within the scope of the system, to obtain a reduction in the fine imposed for having exceeded their quota in respect of those re-rolled products. For that reason, in order to ensure compliance with the quota system, it is necessary to apply the same rate of fine to all undertakings, regardless of their production structure. The Commission also contended that the degree of adapting fines to individual circumstances that is possible in the case of infringements of Articles 85 and 86 of the EEC Treaty is inconceivable on practical grounds in the case of quota infringements.

3.3. *Appraisal of the parties' arguments*

Preliminary remarks. In my appraisal of the arguments put forward by the parties I wish to state at the outset that, whatever its merits the applicant's suggestion that it would be better for the Commission to apply three standard rates for the three types of producers referred to by the applicant may be disregarded as such in these proceedings. As far as the Court is concerned, the sole question at issue here is whether the applicant has adduced any evidence of exceptional circumstances in its case which justify a departure from the standard rate of fine (see paragraph 7 of the decision in the Court's judgment in the *Lucchini* case). However, that consideration does not in my view rule out the possibility that the applicant may also rely on exceptional circumstances affecting it (namely discrimination) which could also be relied upon by comparable producers. Thus the Commission itself, in pursuing its policy concerning fines, has already applied in all cases of the same kind various exceptional circumstances which have been recognized by the Court in its case-law.

Secondly, I take the view that the Commission is wrong in maintaining that the Court, in paragraph 35 of its decision in the *San Carlo* case, also rejected the possibility of determining the rate of the fine on the basis of the added value. As is clear from paragraph 34 of that judgment, the Court rejects in paragraph 35 only San Carlo's contention that 'the amount of the fine should not exceed the profit on the excess tonnage'. A criterion of that kind would indeed not penalize excess production by loss-making undertakings. The system would therefore be undermined on a large scale. Loss-making undertakings with surplus capacity may also have an interest in reducing their fixed costs by exceeding their quotas, for in that way they can still restrict their losses.

Thirdly, I wish to emphasize that I share the Commission's view that there are substantive differences between the policy concerning fines which is applicable in this case and the policy on fines which is to be regarded as appropriate and reasonable in the case of the infringement of Articles 85 and 86 of the EEC Treaty. To begin with, in the case of the practices prohibited by those two articles, it is their effects of raising prices or preventingprice and cost reductions that are of particular importance as regards an effective policy on fines. [3] Moreover, as is clear from legal practice in the Member States and in the Community

3 — Other effects, such as restriction of competition in relation to technological innovations, quality or provision of services or the exclusion of certain undertakings, are less easy to determine.

and from other indications, effects of that kind can differ substantially from one case to another. Generally they account for no more than 10% of the turnover affected by such practices, although according to the said information, that percentage may be as high as 30%, 50% or even 60% of the turnover in question. Under exceptional market conditions or where the dominant position of the undertakings concerned is very strong in economic terms, the percentage in question may even be as high as 90% of the turnover following the price increase, as for instance in the case of the Organization of Petroleum Exporting Countries (OPEC). Finally, a calculation of the fine which corresponds as closely as possible to the injury caused by a concerted practice or by the abuse of economic power can make it easier to bring individual actions for damages. On each of those three points the infringements of the system of steel quotas are manifestly different in nature. First, the advantages are gained not by an increase in prices or by the prevention of price and cost reductions but precisely by unlawful cost *reductions* (reductions in fixed costs). Secondly, the parties agree that it is possible at least to classify quota infringements in a small number of categories. The calculations carried out by the applicant also show a much smaller difference as regards the advantages obtained than is apparentfrom concerted practices. Moreover, the speed of assessment which is desirable in order to ensure that the fines are effective, and the large number of cases, preclude a distinction as far-reaching as that which is possible in the case of the infringement of Articles 85 and 86 of the EEC Treaty. The practice has therefore arisen whereby the Commission leaves the assessment of exceptional circumstances in an individual case first and foremost to the Court of Justice, at least where no relevant indications are to be found in the existing case-law of the Court. Thirdly, it is highly questionable whether it is also possible, as in the case of infringement of Articles 85 and 86 of the EEC Treaty, in principle to bring individual actions for damages against undertakings that exceed quotas. In that respect a very careful estimate of the injury caused or of the advantages obtained is less important in this case. A more comprehensive estimate of the advantages obtained is sufficient for a non-discriminatory preventive effect.

The central argument of the Commission's defence. As I have already pointed out, the central pillar of the Commission's defence is the argument that it has already put forward in the *Volciano* case. Accordingly, I shall begin by assessing the validity of that submission.

In the first part of that submission the Commission contends that the application of a uniform rate is justified by the objective of the quota system, which is to regulate production, irrespective of the means of production employed. However, that objective by no means rules out as such the possibility that the very principle of equal treatment thus laid down may, where there are differences in production, profits and costs, make it necessary to adjust the rate of the fine to take account of such differences. The objective in question can justify the deterrent effect of the fine imposed only if it is equally effective in all cases. Moreover, in its submissions the Commission has not actually denied that the fines imposed give rise to different consequences, as calculated by Queenborough in its application. Thus the objective of preventing infringements is not attained in the case of integrated companies, and in the case of certain re-rollers it is supplemented by a real punitive sanction. In any event, the result is severe discrimination within the meaning of the

interpretation of that concept in the case-law of the Court.

In the second part of that submission the Commission further clarifies the preventive purpose of the fine (namely to prevent profits being made or losses being reduced) and confirms that the rate is fixed having regard exclusively to integrated undertakings which by definition manufacture products whose added value is higher than that of undertakings engaged in re-rolling semi-manufactured products. In any event that argument makes it clear that undertakings with fixed costs that are lower for structural reasons are indeed penalized more severely.

The third part of that submission consists exclusively of the statement, unsupported by any reasons, that it does not follow from the justification provided that in order to be valid every fine must be proportionate either to the profit earned or to the added value.

In the fourth part of that submission the Commission states that the added value depends on a number of different factors and varies from one rolled product to another and that there are not two categories of undertakings (producers and re-rollers) but a whole range of different categories. That argument is by its very nature merely a practical argument rather than one of principle. In practice the objections to a distinction of that kind can be overcome if the burden of proving that the advantage which it gained by exceeding its quota is smaller is borne by the undertaking concerned. In all probability that burden of proof can also be easily discharged on the basis of the accounts kept for the purposes of value-added tax if the concept of added value is taken as a basis.

In the fifth part of that submission the Commission itself contends that the application of the standard rate raises the question whether the fine is proportionate to the gravity of the infringement committed.

In the sixth, seventh and eighth parts of that submission the Commission relies on three arguments in support of the view that the question raised should be answered in the affirmative. *In the first place*, it claims, every tonne of excess helps to upset the balance between supply and demand. That may be correct, but logically it can only lead to the conclusion that every infringement must be countered by preventive measures which are equally effective. No rate of fine can be justified if in certain cases (integrated undertakings) it fails to achieve its preventive purpose and in others (re-rollers) it goes far beyond the preventive purpose as referred to by the Commission itself. *Secondly*, the Commission relies on the justification that re-rollers were also aware of the standard rate of fine. It seems to me clear, however, that information concerning the existence of a uniform rate cannot justify any discriminatory effect resulting therefrom. *Finally*, the Commission adds that under Article 58 the fines imposed must not exceed the value of the tonnage produced in disregard of that provision, regardless of the method of production and consequently without reference to the value added to a product by a re-roller. I am not swayed by that argument either. Neither the maximum fine provided for by Article 58, nor — still less — the maximum fine corresponding to 10% of the turnover of the undertakings concerned which is provided for by Regulation No 17, precludes account being taken, when actually determining the fine, of the degree of culpability, the gravity of the infringement and the advantage gained or the injury caused thereby. That is inherent in every provision which sets a limit to the amount of the fine. Moreover, in that regard I must point out that even the criterion applied by the Commission, according to its own explanation, is based not on the market value of the product but on the 'cancelling out' of the advantages gained (namely the profit or the reduction of losses). In my view those considerations are in themselves sufficient to support the conclusion that that argument also fails to provide valid justification for the manifestly

discriminatory effects resulting from the application of the uniform rate of fine.

New arguments. The argument raised in the course of these proceedings, to which I referred earlier, to the effect that the criterion proposed by the applicant is unworkable in practice, cannot in view of its nature justify in my view any significant interference with the fundamental principle of equal treatment of identical situations and of (proportionately) dissimilar treatment of situations which are in certain material respects dissimilar. Moreover, as I said earlier, the application of a criterion of the kind proposed by the applicant can be made easier if the burden of proof concerning the contested reduction is borne by the applicant.

The Commission's argument to the effect that in the *San Carlo* judgment the Court rejected the possibility of basing the fine on the added value (or on the 'value produced' or the 'contribution') is in my view untenable in the light of my previous remarks concerning the central feature of the Commission's defence. Only the possibility of taking the profit resulting from the infringement as a basis for the fine was quite rightly rejected by the Court in that judgment.

Equally untenable, in my opinion, is the further argument put forward at the sitting, to the effect that a distinction as regards the amount of the fine which is made according to the profit level, the added value or what the applicant refers to as the 'contribution' would lead to evasion of the quota system. The reasoning underlying that argument which I outlined earlier cannot alter the fact that, for a preventive measure to be absolutely effective as regards an independent re-roller, a fine which deprives the latter of any direct or indirect benefit resulting from the infringement must be deemed sufficient to combat excess production effectively. This is certainly true as the Commission has not contested the applicant's submission that, in the case of integrated undertakings, the rate of the fine permits an advantage to subsist where they exceed a quota and therefore (at least for a first infringement) it is not absolutely effective as a preventive measure.

It seems to me correct that acceptance of the applicant's contention that the principle of equal treatment has been breached may perhaps compel the Commission, as it has pointed out, to revise (that is to say, to increase) also the rate applicable to integrated undertakings. [4] However, that problem is not at issue in these proceedings.

Conclusion. In conclusion, I consider that the applicant's third submission is well founded. On the basis of Queenborough's calculations which are set out on page 7 of its application and are not as such contested by the Commission, and having regard to the element of uncertainty in that respect which is acknowledged by the applicant itself, I propose that the Court should reduce the criterion for calculating the standard rate in this case to 35% of 75 ECU = 26.25 ECU per excess tonne.

4. *Fourth submission*

In its fourth submission the applicant maintains that the fine for the fourth quarter was fixed at a rate 25% higher than the normal rate for that quarter, because of the finding that quotas had been infringed in the third quarter. Since the Commission

4 — Of course, if the Commission, following the example of certain private restrictive agreements relating to quotas, does not seek to make the fines imposed altogether prohibitive, that treatment should apply, on the basis of the principle of equal treatment, not only to integrated undertakings but to all undertakings.

itself acknowledged that an exceptional situation arose in the third quarter and accordingly fixed the rate of the fine at 50% of the normal rate, the applicant contends that in the circumstances the Commission should also have increased the normal rate for the fourth quarter only by one half of 25%, that is to say by 12.5%.

In order to enable the Court to determine whether this submission is well founded, I consider it particularly important to ascertain whether it is supported by analogy, by paragraphs 10 and 11 of the decision in Case 78/83 (*Usinor* [1984] ECR 4177) given by the Court on 13 December 1984, that is after the hearing in this case. In that judgment the Court considered that a 'purely formal' infringement during the third quarter of 1981 could not justify the imposition of a supplementary fine for a repetition of the infringement in the fourth quarter. In my view the analogy between the two cases seems questionable, having regard *inter alia* to the wording of Article 12 of Decision No 1831/81. An infringement was clearly established in the third quarter, although the Commission imputed only part of the responsibility for it to the applicant. Moreover, the Commission correctly points out in its defence that the scale of fines applicable permits an increase in the fine by as much as 100% of the normal rate. In those circumstances I cannot, even in the light of the *Usinor* judgment, regard an increase in the fine equal to 25% of the basic rate as inequitable. In my view, therefore, the applicant's fourth submission must be rejected.

5. *Summary and conclusion*

To summarize my earlier findings, I consider that the applicant's first, second and fourth submissions must all be rejected on the grounds stated. As regards the third submission, I have come to the conclusion, after carefully examining all the arguments put forward by the Commission in its defence, that the rate applied severely discriminates against the applicant without any valid justification having been adduced. Consequently, since I consider the third submission to be well founded, the fine imposed for the third and fourth quarters of 1981 should, for the reasons which I stated earlier, be calculated as follows:

As regards the third quarter, the normal rate should be reduced to 26.25 ECU per tonne in the present case, as I have proposed, and that normal rate should be halved, in accordance with the method applied by the Commission, to give:

0.5 × 2 330 (tonnage in excess of the production quota) × 26.25 ECU = 30 581.25 ECU.

As regards the fourth quarter, the normal rate should be reduced in the present case, as I have proposed, and the increase equal to 25% of the normal rate should be retained, in accordance with the method applied by the Commission, to give:

1.25 (3 263 + 697) = 3 960 (tonnage in excess of the production and delivery quotas) × 26.25 ECU = 129 937.50 ECU.

Total fine: 30 581.25 ECU + 129 937.50 ECU = 160 518.75 ECU.

In conclusion, therefore, I propose that the Court should:

(1) Reject the applicant's first, second and fourth submissions;

(2) Declare the applicant's third submission to be well founded only in so far as it constitutes a ground for reducing the fine in accordance with the applicant's second conclusion;

(3) Accordingly reduce the fine imposed on the applicant to 160 518.75 ECU;

(4) Order the parties to bear their own costs.