OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 23 FEBRUARY 1984

My Lords,

This action is brought by a Dutch steel producer which I shall call Estel. Estel is a member of the European Confederation of Iron and Steel Industries, which I shall refer to as Eurofer.

In the proceedings Estel asks for the annulment, either wholly or in part, of a decision of the Commission dated 24 March 1983. That decision found that Estel had infringed Commission Decision No 1831/81 of 24 June 1981 (Official Journal 1981, L 180, p. 1), in the fourth quarter of 1981, by exceeding the parts of the quotas for Category Ib and Category V products which could be delivered on the common market by Estel. It was said that Estel had exceeded the Category Ib products by some 22 132 tonnes, and the Category V products by 4 334 tonnes. As a result of these alleged infringements, the Commission imposed a fine of 2 183 445 ECU. Estel claims that, if it fails on its main point, in any event the fine should be reduced.

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. By Article 10, the Commission had the power to adjust the quotas for Category Ia products used in the form of hot-rolled products for the production in the Community of small welded tubes and it was empowered to authorize the relevant deliveries in the common market. Article 11 (1), as amended by Article 1 (6) of Commission Decision No 1832/81 of 3 July 1981 (Official Journal 1981, L 184, p. 1) allowed a 3% tolerance where a production quota was exceeded, "it being understood that production of these categories as a whole may not exceed the sum of the quotas assigned to each of these categories of products". It is with that tolerance, in part, that these proceedings are concerned. Article 12 of the decision provided for fines to be imposed for breach of the quotas established by the Commission. The fine was "generally" to be 75 ECU for each tonne in excess of the quota, but it might be increased to double that amount if the quota were exceeded by 10% or more or if the undertaking had exceeded its quotas in a previous quarter.

The facts of the case, shortly, are these.

On 10 November 1981 the Commission told Estel of the reference productions and the quotas for the fourth quarter of

1981. Following an application dated 16 January 1982 by Estel for an adjustment under Article 10 of the Decision, the Commission, in its letter of 8 March 1982, increased the production quota for Category Ia products and the amount which could be delivered on the common market by an amount which subsequently was corrected to 84 343 tonnes. That figure is 12 300 tonnes less than Estel had asked for in its application, yet Estel did not challenge the Decision contained in the letter of 8 March 1982.

By a further letter of 6 October 1982, the Commission informed Estel that it had exceeded the quotas in the fourth quarter of 1981 and that consequently a fine could be imposed. There was a meeting, at which Estel's representatives gave their views on the matter, and thereafter the Commission adopted the decision which is challenged in these proceedings.

The decision itself recites that Estel had previously exceeded its quotas in the third quarter of 1981 and had been fined for doing so. The Commission therefore found it appropriate to increase the fine in respect of the fourth quarter and the fine was fixed at 82.5 ECU per tonne, that is, an increase of 10% on the normal fine of 75 ECU.

The Court has already been seized of an application by Estel, challenging the decision imposing a fine in respect of the third quarter. In my opinion in that case, I took the view that, although the fine should be reduced, the Commission's decision should not be annulled, because Estel had exceeded the quotas. Counsel for Estel, in the course of his submissions to the Court today, has accepted that if the Court is against him on his primary point in the first case, then he cannot succed in setting aside the whole Decision to fine his clients in the present case.

The first contention which Estel puts forward in support of its claim for an annulment is that the Commission, in breach of Article 15 of the ECSC Treaty, has failed to give adequate reasons for its decision. It is said that the Commission did not take into account Estel's arguments; it did not explain why they were rejected or why the case was justified as falling within the general rule for the purposes of the fine referred to in Article 12 of Decision No 1831/81.

I consider that this argument should be rejected. In my opinion, in its Decisions imposing fines the Commission is not required to discuss all the matters which are brought to its attention. It is sufficient if it sets out the grounds upon which the decision is founded. It is not obliged to deal expressly with all the grounds which it rejects. This view is, in my opinion, supported by judgments of the Court, including the decision of the Court in Case 86/82 *Hasselblad* v *Commission* ([1984] 883, at para. 17) and Case 76/83 *Usines Gustave Boël* v *Commission* ([1984] 859, at para. 9). As I said in the first *Estel* case, and as I

believe to be supported by the Court's decision in Case 179/82 *Lucchini* v *Commission* ([1983] 3083, at paras 7 and 8), where fines are to be imposed, as a general rule at a specified rate, reasons need only be given where the general rule is not applied.

Here, there is little doubt that the Commission did not set out clearly why it came to the conclusion that Estel should only be fined in respect of exceeding the amounts of Category Ib and Category V products which could be delivered in the common market since the Decision recites that there had been an excess in respect of all products save Category Ia. But there is no difficulty about this, since it is accepted that the application of the 3% tolerance, to which I have referred, took care of the excess in Categories other that Ib and V, and no complaint is made by Estel that no sufficient reasons were given for this.

The second argument put forward by Estel is that the Commission acted unlawfully so far as concerns 5 459 tonnes, that is, part of the excess in respect of which it was fined, by basing its decision on a method of applying Article 10 of Decision No 1831/81 which it did not reveal until after the fourth quarter of 1981.

It is common ground that there was no excess of Category Ia products delivered in the common market or, indeed, produced by Estel in the fourth quarter. It is indeed accepted that there was a shortfall of 5 056 tonnes in the amount of Category Ia products which could have been delivered.

What Estel says is that, if the adjustment to the Category Ia quota made by the Commission under Article 10 had been greater than it was, the sum total of all Estel's quotas would have been higher and the shortfall in delivery by Estel under Category Ia would also have been higher. The effect of this would have been that the 3% tolerance provided for under Article 11 would have been greater and, indeed, would have been sufficient to take up the extra 5 459 tonnes, thereby reducing the total amount of the excess.

It has been assumed, for the purposes of this argument, that the provisions of Article 11, which refer only to production quotas, cover also deliveries in the common market. Since this assumption has not been challenged, it does not seem to me to be necessary to question it in this case.

Estel's argument, however, should, in my view, be rejected. It is quite clear that it did not challenge the lawfulness of the Decision of 8 March 1982, which made the adjustment under Article 10, even though at that stage it had, and knew that it had, produced and delivered 12 300 tonnes of hot-rolled products for the production of small welded tubes more than the amount of the adjustment which was granted by the Commission, but which was part of the amount which Estel had in fact asked for. Estel only stayed within the overall Category Ia

quota because it had cut down on the deliveries of other products falling within Category Ia, apparently in order to try to keep within the overall total and thereby to take advantage of the 3% tolerance even if it produced an excess in respect of some of the products in the other Categories.

As I see it, the shortfall in the Category Ia products was less that Estel thought, only because the 12 300 tonnes were not covered by the adjustment made under Article 10.

The fact remains, however, that if the Commission's method of applying Article 10 was mistaken, Estel did have the opportunity of seeking to correct the position by challenging the decision which made the initial adjustment. It did not do so. It seems to me that it cannot now reopen the matter. The amount of Category Ia products which could be delivered in the common market, as fixed in the decision of 8 March 1982, is binding on Estel and the Commission cannot, in my view, be accused of acting unlawfully by taking that amount into account when calculating the 3% tolerance.

It is accordingly, in my view, not necessary for the Court in this case, or for me, to consider in detail whether the approach of the Commission was right in the way that it applied Article 10.

There is, however, obviously force in Counsel for the Commission's submission to the Court today that, on any view, it cannot be right to take account of the 12 300 tonnes at two stages of the calculation.

In support of its allegation that the Commission behaved unlawfully, Estel has further contended that the Commission did not reveal its method of applying Article 10 until after the end of the fourth quarter of 1981. In my view, it has not been established that this was so, although I remain of the view expressed in my Opinion in the first *Estel* case that it is better that a method of interpretation which may be in doubt should be set out by the Commission in the text of its decision. It seems, from the documents that were produced to the Court in the first *Estel* case, that Eurofer was given an oral explanation of the Commission's method of applying Article 10, and that it told its members immediately by a telex of 2 November 1981. The Commission gave written confirmation of the method which it was adopting in its letter of 10 November. After there had been discussions internally, Eurofer wrote to the Commission on 12 November, saying that its members wanted the Commission to review the position. It seems to me that, clearly by then, the Members of Eurofer knew what the position was. They may not have agreed with it, and, indeed, Estel maintains that discussions between it and the Commission went on during December and January of the following year, but they cannot say that the method of applying Article 10 had not been determined, or that they could not predict the amount of any adjustment, before the end of 1981. In those circumstances, it does not seem to me to be necessary to consider the specific companies who are said to have applied a method different from that adopted by Estel, although, as Counsel for Estel has

submitted today, the letters which have been produced do not seem to provide strong or clear evidence of that fact.

Estel says in the alternative, however, that, even if it is wrong so far, it was not at fault because it adopted an approach — an interpretation — which was reasonable and which had not been put in doubt. Therefore, it should not be fined.

In my view, this argument, too, should be rejected. Estel knew what would be the consequences if it produced and delivered hot-rolled products which were not covered by the adjustments made under Article 10. As a result of the exchanges between Eurofer and the Commission, Estel knew by the second week of November what was the Commission's method of applying Article 10. It therefore knew, or must be deemed to have known, that if it applied some other method it would risk a fine, either because it had exceeded the production quota for Category Ia products — or the amount which could be delivered on the market — or because there would be a reduction of the tolerance which could be allowed in respect of excesses of the products in other Categories.

In going ahead and applying its own interpretation in the fourth quarter, it seems to me that Estel accepted the risk which it took. Again, if Estel had challenged the view which the Commission adopted, it could have sought to protect its position by applying to this Court. Whether it would have been successful is another matter, but since it chose not to do so it seems to me that it must bear the consequences.

Finally, Estel claims that the Commission was wrong to fix the fine because it did not take into account the circumstances which led to the excess. It ignored the gravity of the infringement and it failed to take into account Estel's real responsibility for it.

The Commission has maintained in its written pleadings that it has no discretion to take account of subjective considerations when fixing the fine under the first paragraph of Article 12. For the reasons which I gave in my Opinion in the first *Estel* case, this seems to me to be wrong and the Commission does have the discretion to vary the figure of 75 ECU downwards in appropriate circumstances.

However, whether or not the Commission did itself wrongly fail to take account of the surrounding circumstances in the present case, or, as Estel says, left aside circumstances which were sufficiently exceptional to justify a reduction in the normal rate of 75 ECU, this Court has unlimited jurisdiction under Article 36 of the Treaty in respect of fines, and may itself assess what the fine ought to be.

In this case, unlike the first *Estel* case, it does not seem to me that the circumstances do justify a reduction in the fine. This is not a case where obscurities as to the correct interpretation, or application, of Article 10 of Decision No 1831/81, can be said to have led an undertaking to

exceed the quota for Category Ia products, or the amount of them which could be delivered in the common market, so as to make it vulnerable to a fine. The excess with which the Court is concerned concerns Category Ib and V products. Estel's only grievance is that it cannot reduce the effect of the excess as much as it would wish to do so, because the Commission failed to make a greater adjustment under Article 10 of the decision. If Estel had respected or applied the Commission's method of interpreting Article 10 and had limited its production and delivery of hot-rolled products during the fourth quarter of 1981, it would not be in that position. Alternatively, if it had sought to protect itself by challenging the decision making the adjustment and had succeeded, it would equally have removed its liability to a fine. Neither of those events happened, and, in my opinion, no circumstances have been shown which justify the Court altering the fine imposed by the Commission in this case.

For those reasons, in my opinion, this application should be dismissed and Estel should pay the costs of the Commission and bear its own costs.