OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 29 OCTOBER 1981 [1]

Mr President,
Members of the Court,

The case on which I shall today give my views concerns the system of production quotas adopted in Commission Decision No 2794/80 (Official Journal, L 291, p. 1 of 31 October 1980), the essential points of which the Court already knows from Joined Cases 275/80 and 24/81 *Krupp Stahl AG* v *Commission* (opinion of 25 June 1981).

The system was implemented in relation to the applicant, an undertaking producing crude steel and light sections, through an individual decision of the Commission adopted on 1 November 1980, in which the reference production figures for the fourth quarter of 1980 and the production quotas for crude steel and the products in Group IV within the meaning of Article 2 of Decision No 2794/80 were announced.

Article 13 of Decision No 2794/80 was also applied in relation to the applicant; that article reads as follows:

"The Commission shall verify the accuracy of the reports and information provided by undertakings. Undertakings must allow such verification work, and no individual decision shall be required for this purpose . . .".

The applicant was informed of this by a letter from the Commission dated 3 November 1980, with the explanation that the checks would be carried out by employees of a firm of auditors accompanied by engineers. Initially the applicant refused to permit these checks, invoking Article 1 (4) of Decision No 2794/80 which provides:

"The Commission shall manage the quota system. It may obtain assistance from independent agencies or from experts. The business secrecy of the undertakings shall be maintained."

The applicant considered its business secrecy imperilled because employees of a competing undertaking were to take part in the checks. In its view only inspectors employed by the Commission or independent experts should be called upon for these purposes. However, it is clear that at some stage since December 1980 the applicant's premises were checked, even though the Commission did not alter its methods, that is to say it continued to engage technical experts from other undertakings. According to the applicant's statements in the oral procedure no special problems were caused by that.

On the ground that the quota system set up by the Commission and its enforcement are in various respects objectionable, the applicant applied to the Court of Justice on 24 November 1980, requesting a declaration that Decision No 2794/80 is not applicable and that the decision of 1 November 1980 notified to it is void.

My opinion as to these claims is as follows:

I — Admissibility

The admissibility of the application as such was not called in question — and

1 — Translated from the German.

quite rightly as I have shown in my opinion on the aforesaid *Krupp* cases.

The Commission, however, considers inadmissible two of the submissions in relation to the general decision, but not in relation to the contested measure itself. This applies, first, to the complaint that, in order to verify the accuracy of the reports and information provided by the applicant, the Commission called in experts in the service of competing undertakings. It applies, secondly, to the criticism directed against Article 7 (2) of Decision No 2794/80 in accordance with which, with regard to the delivery of products subject to the quota system, the undertakings may not exceed, by group of products, for deliveries within the common market, the ratio of Community deliveries to total deliveries in those 12 months of the period from July 1977 to June 1980 in which the total production of the four groups of rolled products was the highest. In this connection the Commission argued that, because the ECSC Treaty permits undertakings to challenge general decisions only on narrowly-defined conditions, namely when there is conclusive evidence of misuse of powers in relation to the applicant, a general decision may not be reviewed by the Court in proceedings against an *individual* decision (apart from complaints which, like the submission that the measure did not contain a sufficient statement of reasons, relate to the general decision as a whole) unless it is shown that the contested individual decision constitutes an application of the impugned provision of the general decision, that is to say, it must be shown that the provision complained of constitutes the basis for the individual decision. According to the Commission, that cannot be said to be the case, either with regard to Article 7 (2) or to the methods adopted by the Commission in its checks.

I concur with that view.

1. That is quite clear, as far as the checking procedures criticized by the applicant are concerned. The aim of its criticisms is not in fact to obatin a finding that certain provisions of the general decision, Decision No 2794/80, are inapplicable; the applicant neither questions the legality of Article 13, which provides that the Commission must verify the accuracy of reports and information nor suggests that criticism may be levelled at Article 1 (4) of the decision, which refers to obtaining assistance from independent agencies or from experts and to the maintenance of the business secrecy of the undertakings. Rather, it complains that the last-mentioned provision has been misapplied because the Commission did use independent experts.

It should also be noted, as in the judgment of 16 December 1963 in Case 18/62 *Barge* v *High Authority* [1963] ECR 259, that complaints which are concerned solely with the methods whereby a decision is applied are excluded. It is also clear that the contested individual decision informing the applicant of its production quotas does not refer to the said provisions or to the checks carried out by the Commission. That factor is decisive, whereas, for the inclusion of the checks in these proceedings it is insufficient for the applicant to state that they were of "an instrumental nature" in relation to

the production quotas and constituted a subsidiary element of the system. In fact if the methods by which the checks were carried out were declared unlawful it would by no means follow that the decision at issue, whereby the applicant was informed of its production quotas, would have to be altered.

Nor is it the case that if the applicant's argument is rejected the Court will be unable to review the methods by which the checks were carried out, because Article 13 of Decision No 2794/80 provides for checks without prior individual decisions owing to overriding administrative reasons connected, as we have heard in the oral procedure, with the number of checking operations. If undertakings in fact refuse to have the checks carried out fines may be imposed in accordance with Article 13 of Decision No 2794/80 and in proceedings contesting such fines all questions concerning the checks may be submitted to the Court of Justice.

2. With regard to the possibility of reviewing in proceedings such as these the provisions contained in Article 7 (2) of Decision No 2794/80 concerning deliveries, I may refer to my opinion in the *Krupp* cases. There I have already argued that an objection to the legality of a particular provision of a general decision is inadmissible unless the measure which is directly challenged constitutes an application of the contested provision and that the fixing of the production quotas in accordance with the general rule contained in Article 7 (2) concerning compliance with a certain ratio between deliveries within and outside the common market cannot be held to constitute such a measure.

Neither the applicant's observation that delivery quotas and production quotas form two aspects of a single, indivisible scheme nor the above-mentioned judgment of 16 December 1963 in Case 18/62 provide grounds for arriving at any other conclusion.

The important point is that according to the said judgment it is a basic requirement for the admissibility of an objection to the lawfulness of a general decision that the contested individual decision should be based on the general decision, that is to say, it must constitute an application of the general decision. In so far as criticism of other provisions of the general decision was considered admissible — that case concerned general decisions on the equalization of ferrous scrap — on the ground that they might impair the operation of the scrap equalization scheme, it may not be overlooked that that case concerned exceptions from the equalization of prices and from liability to charge and that the finding that the provisions were unlawful in fact affected the equalization contribution fixed for the applicant in that case. However, that is not the position in this case, even if it cannot be denied that the restriction of deliveries in the common market by Article 7 (2) is inseparably connected with the fixing of production quotas.

3. I am therefore of the opinion that in proceding with the examination of the case we may disregard the two complaints which have been considered above.

II — Substance

1. The inadmissible retroactive effect of Decision No 2794/80

First of all, the applicant complains that Decision No 2794/80, which, according to Article 15 thereof, entered into force on the date of its publication in the Official Journal of the European Communities, that is on 31 October 1980, provided for production and sales achieved since 1 October 1980 to be taken into account. By making provision for such retroactivity, it violated a general legal principle which applies to all spheres of law and is, for example, incorporated in Article 12 of the Italian Civil Code. The applicant further submits that the provision is in breach of the requirement that legitimate expectations should be upheld. In that connection the applicant acknowledges that it cannot be disputed that as early as 11 October 1980 the Commission made public its intention to introduce a system of production quotas. At that time however it failed to make clear that the system would also refer to deliveries. Furthermore, the relevant draft decision was repeatedly amended in October 1980 because, according to the press, differences of opinion arose within the Council regarding *inter alia* the period of time to be covered by the measure. The trade had reason, therefore, to believe that the Commission would drop the plan and adopt other means, such as voluntary restrictions on production, or at least that the plan would come into operation at a later date. The applicant submits that if the inclusion of the month of October in the system is now approved, that will incontestably be disadvantageous to undertakings which had been producing at that time and had had to make deliveries. Such transactions did not, it is argued, benefit from the effects of the quota system in the form of increased prices; further, since the production quotas were reduced by virtue of the fact that the production for the month of October was taken into account, only a limited degree of compensation could be obtained later through higher prices for the rest of the year's production. In relation to these submissions it must first of all be noted that, according to previous decisions of the Court of Justice, retrospective effect is not absolutely ruled out in Community law. I will cite just two judgments concerning monetary compensatory amounts (the judgment of 7 July 1976 in Case 7/76 *IRCA* v *Amministrazione delle Finance dello Stato* [1976] ECR 1213 and the judgment of 25 January in Case 98/76 *Firma A. Racke* v *Hauptzollamt Mainz* [1979] ECR 69) in which the application of monetary compensatory amounts to transactions before the publication of the relevant regulations was held to be justified on the ground that it was unavoidable in view of the purposes to be achieved by the system of monetary compensatory amounts and in order to make the measures fully effective. It was, however, held to be essential that the legitimate expectations of those concerned should be duly respected, that is to say that such a measure should have been forseeable.

In this case the Commission has established that the effectiveness of the system would have been considerably impaired if the month of October 1980 had not been included because the undertakings, with an average degree of utilization of 50 %, could have doubled their production in October. Moreover, it cannot be denied that the undertakings were notified in good time of the intro-

duction of the quota system, first through a communication from the Commission of 11 October 1980 (Official Journal C 264, p. 2) which referred to the inclusion of the month of October in the quota system, and secondly through Decision No 2613/80/ECSC, which was published on 11 October 1980 (Official Journal L 268, p. 25) and which required the undertakings to provide information concerning their production for the month for October. Furthermore, the impression is not conveyed that those notifications were invalidated by subsequent events. At any rate, the Commission has given the Court assurances, which the applicant could not refute, that subsequent discussions concerned other aspects of the system but that the exclusion of the month of October 1980 from the system never appeared probable.

Furthermore, the view may also be taken that the situation here has nothing to do with retroactive effect in the true sense but instead resembles the facts in Case 44/65 *Hessische Knappschaft* v *Maison Singer et Fils* [1965] ECR 965. In that case it was held that a provision might determine the legal consequence of actions in the past and that from the date of the entry into force of the provision events occurring before that date might give rise to rights and duties. Likewise, the quota system, which applied for three months and which was announced at the end of October 1980, dealt in part with facts which took place in the past and created a link between those facts and the question of the legality of subsequent conduct. It was, however, very unlikely — precisely because of the above-mentioned communication from the Commission — that the quotas would already have been exceeded by the production for the month of October with the result that when the system came into force it would no longer have been possible to make a correction and thereby to avoid fines for actions which took place in the past; rather, it may be assumed that undertakings could still adjust their production in the months of November and December 1980 and so avoid the fines.

When, moreover, regard is had for the fact that the applicant did not suspend production until 15 December 1980 there is in my view no ground for holding that the quota system for the fourth quarter of 1980 was inapplicable as being contrary to the rule against retroactive measures.

2. The infringement of Article 58 of the ECSC Treaty

Article 58 of the ECSC Treaty provides that, before a system of production quotas is established, the Consultative Committee is to be consulted and that quotas are to be determined equitably on the basis of studies made jointly with undertakings and associations of undertakings. In relation to the last-mentioned point the applicant concedes that in October 1980 three meetings were in fact held between the Commission and associations of Italian steel producers. Nevertheless, it considers that there was no true consultation in the sense of genuine cooperation, as is provided for in Article 58 of the ECSC Treaty. It points out that a few days after the first meeting of 4 October 1980 the matter was in fact already before the Council and argues that there was therefore no opportunity for the associations of undertakings to present alternative proposals; instead, the details of the scheme, in particular the calculation of

the production quotas, were dictated by the Commission. At any rate, according to the applicant, it is beyond dispute that none of the proposals put forward by the Italian undertakings, which concerned *inter alia* simultaneous protective measures against imports, the checks to be carried out, State intervention in competition or the need to take into account production capacity in determining the production quotas was adopted. Furthermore, the applicant considers that, in view of its size, it should itself have participated in those consultations; its absence is, in its submission, a serious error such as to render the system inapplicable.

It is my opinion that on this point too the applicant's submissions cannot be accepted.

The Commission rightly points out in the first place that, since Article 58 merely provides for *consultation* with the undertakings and not a wide-ranging right of co-determination, it is not required to take into account the views put forward by the undertakings. It is also clear that from the time when the matter was referred to the Council until the adoption of the decision (on 31 October 1980) there was still ample time and opportunity for the undertakings to set out their point of view, particularly since in the Commission's proposal to the Council it was expressly stated at various places (pages 10, 12, 13 and 14) that the studies required by Article 58 (2) had not yet been completed. Furthermore, it is impossible to maintain that none of the views put forward by the undertakings concerning the implementation of the quota system were taken into account by the Commission, as is shown by a comparison of the wording of the proposal originally submitted to the Council with the wording of the decision, particularly with regard to the rate of reduction prescribed.

However, as regards consultation with the applicant in particular it should be noted, first, that a representative of the undertaking participated in the meeting on 17 October 1980 and had an opportunity of expressing his views there. Secondly, in view of the urgency of the measures, the Commission could not seek the individual views of some 350 undertakings. Instead, it was entitled to be satisfied with hearing the associations and, in addition, individual undertakings which requested an opportunity of stating their views.

There is accordingly no doubt that the adoption of Decision No 2794/80 did not entail an infringement of essential procedural requirements.

3. Insufficient protection against imports

In a further submission the applicant pointed out that Article 58 of the ECSC Treaty contains an express reference to the need for a system of production quotas to be accompanied to the necessary extent by the measures provided for in Article 74. Under Article 74 it is a condition for taking measures in relation to non-member countries that one of the products referred to in Article 81 should be imported into the territory of one or more Member States in relatively increased quantities and under such conditions as to cause serious injury to production within the common market of like or directly competing products. The applicant states that, although that condition was fulfilled —

an increase in imports of rolled products and semi-finished products having been recorded and, moreover, at low prices because producers in non-member countries have lower production costs or, as in Spain, enjoy subsidies — the Commission failed to take effective measures such as fixing import quotas or minimum prices. In the applicant's view, that must be regarded as an infringement of Article 58, which, because of the express reference to Article 74, is to be considered as requiring *simultaneous* measures to counter imports. That is also said to provide grounds for holding that there was a violation of the principle of proportionality since the measures adopted for the Community undertakings were, by virtue of their incomplete nature, not conducive to their objective (namely, an increase in prices in the common market through a reduction in supply), despite the fact that sacrifices were demanded of the Community undertakings.

In relation to that submission it is possible to raise the question, as does the Commission, whether the unlawfulness of a specific measure may in fact be established by arguing that a measure of another nature was not adopted or whether in that case an action for a mandatory injunction would have been appropriate. However, it is unnecessary to resolve this problem now since, in my opinion, other considerations provide sufficient guidance for this case.

First of all, it is clear from the words "to the necessary extent" that Article 58 does not lay down as an imperative requirement that the system of production quotas must be linked with measures under Article 74. The wording adopted refers instead to the need for an "evaluation of the situation resulting from economic facts or circumstances" within the meaning of Article 33 of the ECSC Treaty. The difficult political decision which that entails must not only take into account the objective defined in Article 3 (f) of the ECSC Treaty — promotion of the growth of international trade — and the obligations of the Community under GATT but also the effects of measures under Article 74 on exports form the Community in general and steel exports in particular, and in this context it must be borne in mind that the result might possibly have been even smaller production quotas. The need to have regard to that factor was established in the judgment of 18 March 1980 concerning minimum prices for concrete reinforcement bars (Joined Cases 154, 205, 206, 226, to 228 and 264/78, 39, 31, 83 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907). It was stated in paragraph 110 of the decision at p. 1015:

"It is important to point out also that in its negotiations with non-member countries the Commission faces considerable difficulties as a result of the fact that the ECSC is a net exporter of steel; in such circumstances it is compelled to ensure the continuance of Community exports at the same time as it must attempt to limit imports into the Community, and it had reason to fear that by taking non-negotiated restrictive decisions with regard to non-member countries it might provoke retaliatory measures on their part which would be detrimental to the general interest."

It is clear from the first paragraph of Article 33 that in such a situation judicial review may be exercised only if misuse of powers or manifest failure to observe the provisions of the Treaty has been

alleged. There are, however, good grounds for doubting whether in this case such an allegation has been duly made and substantiated by the production of specific evidence. The submissions concerning Article 74 may therefore be disregarded.

Apart from the foregoing, it should, however, be emphasized that in relation to non-member countries the Community has by no means remained inactive with regard to the establishment of the system of quotas. I would draw the Court's attention to the arrangements mentioned by the Commission for ensuring that import prices remain at a certain level, which may lead to anti-dumping procedures and the imposition of import duties. I would also draw attention to the various decisions and recommendations concerning the supervision of imports, which give rise to obligations on importers concerning the disclosure of important data and obligations on the Member States concerning supervision and the provision of information to the Commission. Finally, I would mention the prohibition of the alignment of prices on import prices and in particular the agreements concluded with a number of countries concerning the volume of imports and the prices thereof which applied until the end of 1980, which for this case is all that is relevant.

Evidently those arrangements operated satisfactorily, as the Commission has assured us, so that it is difficult to hold that the failure to adopt more comprehensive measures constituted a misuse of powers or a manifest failure to observe the provisions of the Treaty. I refer in this connection to the details provided by the Commission on the decline in imports, in particular from Spain, even in the course of 1980 and early in 1981. In addition I refer to the tables produced by the Commission which set out clearly the development of prices in the Community during the fourth quarter of 1980.

4. Infringement of the prohibition on discrimination and other submissions

I now come to a final group of submissions which, if I am not mistaken, were raised for the first time in the reply. As such they might be considered to have been submitted late and accordingly disregarded; I will none the less deal with them, albeit briefly.

(a) The applicant claimed, with regard principally to the prohibition of discrimination, that the Community institutions tolerated the granting of State subsidies in various forms, contrary to the prohibition in Article 4 (b) of the ECSC Treaty. Large-scale undertakings were thereby artificially kept in existence and unfair competition was permitted. At any rate, it is argued, the Commission failed to have regard when it introduced the quota system, to the fact that undertakings which have benefited in that way are better able to contend with the problems arising through restrictions on production than undertakings which have made considerable investments through their own efforts in order to modernize their plant. Furthermore, the Commission had permitted the establishment of new plant in various countries and failed to take into account the fact that Italian undertakings have in many respects high costs, in particular high energy costs in changing over to electric furnaces.

In so far as these arguments do not simply constitute vague and unsubstantiated allegations, they may certainly

be countered by the objection that the lawfulness of measures taken under Article 58 of the ECSC Treaty may not be called in question on the basis of measures which, for other reasons, were not adopted and which are not directly relevant to the system of quotas. Furthermore, it is well known that the Community institutions are making serious endeavours to master the problem of subsidies in the steel industry, as is shown, for example, by Council Decision No 257/80.

However, in so far as the applicant is arguing that when the quotas were fixed State subsidies and the special costs borne by the Italian industry were not taken into account, it may be pointed out that within the framework of the quota system, which had to be established relatively quickly, it was scarcely possible to give due attention to such delicate and complex questions: furthermore, the applicant has failed to show a more practical way of setting up the system and avoiding the charge of discrimination.

(b) Finally, the applicant also contended that the Commission erred in its estimation of productive capacity in the Community, in proof whereof it pointed to the fact that the production quotas for many undertakings had to be reviewed on the basis of Articles 4 and 14 of Decision No 2794/80. It also complains that quotas were allocated to undertakings which had ceased production and were accordingly able to engage in a lucrative trade in their quotas.

In this regard it should first of all be pointed out that, for the quota system, it was not the productive capacity and the estimation thereof which were decisive but rather the actual production during a reference period. There were good reasons for this since in the case of the actual production there is an objective factor, whereas proceeding on the basis of capacities would, as the Commission has shown, in many respects, have given rise to problems. But the fact that the reference production figures, on which the production quotas were based, required to be adjusted in a number of cases certainly does not indicate that the measures taken by the Commission were basically unrealistic. Such adjustments were built into the system and the criteria were known in principle when the decision was adopted. Nor has it been established that that led to considerable difficulties or that the quota system was reduced to a cypher in practice. In any event, there was a considerable reduction in production, at least in relation to the available capacities.

Finally, with regard to the allocation of quotas to undertakings which had ceased production the Commission stated in the oral procedure that that had occurred initially because, in order to apply the system quickly, it was necessary to have recourse to computerized information which included all undertakings which paid ECSC levies. But that error affected only a very small percentage of total production and it had, moreover, been possible to correct it swiftly. That and the fact that such undertakings disposed of their quotas, which did not, however, affect the sum of the quotas — that is

the relevant factor with regard to the system — certainly does not indicate that the system as a whole was distorted to an appreciable degree or required that the quota fixed for the applicant should be annulled.

III — I therefore propose — observing that it is unnecessary to grant the applicant's request for the production of certain documents — that the application be dismissed as unfounded and that the applicant be ordered to pay the costs.