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

Mr President,
Members of the Court,

The case with which I am about to deal is another case on the system of steel production quotas introduced by Decision No 2794/80 (Official Journal L 291, p. 1 of 31 October 1980).

An undertaking which is affected by those arrangements is Ferriera Padana SpA, a relatively small business, which buys crude steel for the manufacture of concrete reinforcing bars of Group IV within the meaning of Article 2 of Decision No 2794/80. Ferriera Padana was notified on 1 November 1980 of the production quota allocated to it for the fourth quarter of 1980. On 10 november 1980 it requested under Article 4 (4) of Decision No 2794/80 an increase in the reference production in respect of the activation of new plant. The request was granted in a decision of 18 December 1980.

However, Ferriera Padana had already applied to the Court, requesting it to:

Annul the decision of 1 November 1980 together with general Decision No 2794/80, in so far as the latter constitutes the legal basis for the first-mentioned decision;

Remit the matter to the Commission so that it may take the necessary measures; and

Declare that the Commission is obliged to take appropriate measures to ensure fair compensation for the damage caused to the applicant.

The applicant persisted in these claims even after it was notified of the said decision of 18 December 1980 because it objected in principle to the introduction of production quotas for concrete reinforcing bars.

In this case I shall set out my opinion as follows, beginning with the submissions relating to the infringement of essential procedural requirements and then considering whether the Commission infringed provisions of the Treaty.

I — Infringement of essential procedural requirements

As I have already mentioned in my Opinion in the *Rumi* case (Case 258/80), Article 58 of the ECSC Treaty requires that before the adoption of a decision based on that provision the Consultative Committee be consulted and that studies made jointly with undertakings and associations of undertakings be carried out before the quotas are fixed.

The applicant doubts, in the first place, whether the consultation took place because the statement of reasons on which Decision No 2794/80 is based contains nothing to that effect. It considers, secondly, that studies were not carried out jointly with the association of manufacturers of concrete reinforcing bars, but only with the association of producers of crude steel. In this connection it refers to the considerations

1 — Translated from the German.

concerning undertaking's rate of utilization contained in the statement of reasons for the decision and submits that those considerations are clearly not appropriate to concrete reinforcing bars because a prediction of that nature is rendered impossible by factors which cannot be foreseen. Furthermore, studies within the meaning of Article 58 (2) were begun only a few days before the official announcement of the measures so that, since the provision was by then really complete, the studies could no longer have had any influence on it.

In reply to that submission, the Commission stresses, first of all, that the Consultative Committee in fact delivered its opinion on 16 October 1980. That must be decisive, since the circumstance that nothing was mentioned in the statement of the reasons on which the decision was based may not be considered an infringement of an essential procedural requirement and accordingly does not constitute a ground for annulment.

With regard to the studies to be made pursuant to Article 58 (2) the Commission explained that it not only carries out continuous studies of the market in accordance with Articles 46 and 48 of the EEC Treaty but also conducted additional, complementary *ad hoc* studies for the purposes of the system of quotas. In that connection meetings were held not only with the associations of steel producers but also with the association of the so-called "Bresciani". The procedure followed in this matter was plainly proper. In the first place, there are no grounds for doubting that the studies were carried out in good time, as I have shown in detail in my Opinion in the *Rumi* case. Secondly, the circumstance that the applicant is not a member of the above-mentioned association is irrelevant. In any case, as the Commission has assured us, it has in fact the right of presenting its views to the Commission as an individual undertaking; nevertheless, it refrained from exercising that right.

Accordingly, on the basis of the arguments set out by the applicant there is no doubt that, in the adoption of Decision No 2794/80, there was no infringement of an essential procedural requirement.

II — Infringement of Article 58 (1) of the ECSC Treaty

With regard to the alleged breach of substantive law, to which I now turn, the applicant invokes first of all Article 58 (1) of the ECSC Treaty. According to that provision it is a condition for fixing production quotas, first, that there should be a decline in demand of such a nature as to constitute a period of manifest crisis and, secondly, that the means of action provided for in Article 57 should be insufficient to deal with it. The applicant considers that on the market for concrete reinforcing bars neither condition was fulfilled and that therefore the quota arrangements were not justified.

1. In relation to the first point the applicant relies principally upon a communication from the Commission of July 1980 which refers to a decline in orders caused by a fall in demand in the United States. But that is said to be irrelevant with regard to concrete reinforcing bars because transport costs would render the American market unprofitable for such products. Furthermore, in the proposal submitted to the Council by the Commission on 6 October 1980 the emphasis was placed upon the reduced utilization of capacity in crude steel. According to the applicant, that cannot serve to establish the existence of a crisis in concrete reinforcing bars, because crude steel can in fact be processed into other products

and furthermore an increase in the production of concrete reinforcing bars, which was hampered by the system of quotas, could have helped to mitigate the crisis. Furthermore, the Commission itself had stated that in the first half of 1980 the delivery programmes for concrete reinforcing bars had been increasingly disregarded, which, according to the applicant, indicates that there was an increase in production caused by a rise in demand. It is also pointed out that even in 1977 only 50% of the producers of concrete reinforcing bars participated in delivery programmes, whilst in other sectors up to 90% of the producers participated.

It may be that both of the Commission documents referred to by the applicant were insufficiently clear with regard to the difficulties on the market in concrete reinforcing bars, although it should not be overlooked that in the document of July 1980 mention was made not only of the United States market, but also, for example, of the Iranian market and reference was also made in it to large-scale changes and to the particularly difficult situation in the construction industry together with a resultant decline in production. It must also be noted that the Commission's proposal to the Council did not refer exclusively to crude steel and the difficulties facing it, but on the contrary stated that in accordance with the production forecasts for the principal processing sectors a fall in the consumption of steel must be expected.

However, the decisive factor is that at any rate in the course of the proceedings it became entirely clear that reference was properly made to a crisis, not only for the steel market as such, but also for the market in concrete reinforcing bars in particular, which may be assumed to be due in no small measure to the fact that since 1977 only 50% of the manufacturers of concrete reinforcing bars have participated in production limitation programmes, that is to say that from that time no progress could be made in quantitative reductions.

I do not need to repeat now what was said in detail concerning the steel market as such. The situation on the market in concrete reinforcing bars in particular deteriorated owing above all to the state of the building industry as early as the beginning of 1980; since May 1980 a genuine crisis was discernible with a progressive fall in orders and a correspondingly low utilization of production plant. That situation was aggravated by the fact that in the fourth quarter of 1980 the products in Group IV, as the Commission has shown, remained almost 12% below the quotas fixed and that the applicant itself, with an annual capacity of 230 400 tonnes, produced only 81 000 tonnes in the first ten months of 1980.

Thus it is proper to consider that the market in concrete reinforcing bars was affected by a manifest crisis which, moreover, was not limited to a few sectors where undertakings produce only one kind of product, as the applicant considers, and indeed other arguments advanced in this connection by the applicant give no grounds for doubting that the conditions required for the application of Article 58 (1) were fulfilled.

In the light of what has been stated above the view that it is not practical in a crisis affecting the crude steel sector to reduce the demand for processed products, such as concrete reinforcing bars, is irrelevant. The same applies to the applicant's claims that the fall in the price of concrete reinforcing bars, to which the Commission devoted so much attention, is to be explained largely by the increase in competition between

manufacturers and that — if the decline in the price of crude steel is disregarded — the fall in 1980 was only very slight. The same goes for the applicant's suggestion that the appropriate solution in such a market situation was to fix minimum prices. Finally, in this connection it is unnecessary to consider whether, as the Commission thinks, the fall in the prices of concrete reinforcing bars was more pronounced than the applicant calculated because the cost of such bars is determined only as to 40% by the cost of the basic material and it may be assumed that, when the market is unfavourable, the price of the end product determines the price of the basic material. It is in any case clear that, for the Commission, the important factor was not the fall in price but, as is provided in Article 58, the extent of the decline in demand. However, with regard to the applicant's view that minimum prices would have been the appropriate solution in such a situation, it must certainly be conceded that the Commission is right in maintaining that intervention with regard to prices would only have been effective if voluntary restrictions on production had also been adopted and, since the latter could not be attained for the fourth quarter of 1980, the Commission was therefore correct in considering price controls insufficient.

2. The applicant submits that the second condition laid down in Article 51 (1) of the ECSC Treaty was not fulfilled because, in its opinion, the problems which had arisen on the market could have been overcome by *indirect* measures, such as for example action to influence consumption in cooperation with the governments of the Member States, intervention concerning prices or measures concerning commercial policy.

In this connection I have to make the basic point that as regards such economic choices the Commission has a wide discretionary power, as is established by paragraph 63 of the decision cited in my opinion in the *Rumi* case, namely the judgment of 18 March 1980 on minimum prices for concrete reinforcing bars (Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78 and 39, 31, 83 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907 at p. 1005). On the basis of all that we have heard it is impossible to be persuaded of the view that the Commission misused its power when, in considering the indirect measures in question, it came to the view that they were not appropriate.

That is certainly true of measures to stimulate demand, for example subsidies for national house-building programmes, which the applicant mentioned, since the Commission has no powers whatsoever in that sphere.

With regard to the possibility of intervention concerning prices, which has already been mentioned, it must indeed be recognized that new developments took place in 1980 which inevitably caused the Commission to depart from its declaration at the end of 1979 that it was considering the introduction of minimum prices for concrete reinforcing bars, if necessary. The reason was the fact that undertakings were not willing to accede to delivery programmes which, as I have already said, were essential to the operation of such measures.

For the details I may refer to the Commission's proposal to the Council in which reference is made to an increasing failure to comply with the voluntary delivery programmes and the provisions on prices and in which a description is

given of how the Commission sought until the autumn of 1980 to instill greater discipline into the undertakings and how, as in the case of its efforts to attain a voluntary system of production quotas, it encountered stout resistance from the undertakings, which simply refused to yield to such indirect measures.

Finally, with regard to possible measures of commercial policy, it must be said, first, that the applicant has not indicated clearly how the crisis could have been overcome through such measures alone. Secondly, with regard to the effects of the measures actually adopted, reference may be made to what I said in my Opinion in the *Rumi* case. In addition, it may perhaps be noted — in particular with regard to concrete reinforcing bars — that in this connection, as the applicant itself has explained, the anti-dumping procedure was never initiated in 1980, and in 1979 it was used in a single instance. That demonstrates the competitiveness of the sector and indicates that in this connection further arrangements regarding commercial policy did not appear imperative.

III — Infringement of Article 58 (2)

A second substantive submission concerns Article 58 (2) of the ECSC Treaty in which reference is made to the determination of "quotas on an equitable basis" taking account of the principles set out in Articles 2, 3 and 4.

The applicant makes the following points:

(i) In determining the reference production, which was based on actual production, account was not taken of the fact that actual production was affected in the case of certain undertakings through voluntary restrictions on deliveries and through the observance of minimum prices. That caused disadvantages compared with undertakings which made unrestricted deliveries and whose production was not doubly curtailed as a result of the system of quotas.

(ii) There are also grounds for criticizing the fact that the month of October was included in the system of quotas.

(iii) Finally, insufficient regard was had for the principles contained in Articles 2, 3 and 4, in particular the requirement that the most rational distribution of production at the highest possible level of productivity should be ensured.

In my view the following remarks should be made on these points:

1. With regard to the minimum price arrangements and the voluntary restrictions on deliveries in previous years, the Commission assures us that the former did not affect the applicant at all; moreover, as the Commission has shown in detail, the applicant itself failed to comply with the delivery programmes during the months which were used as the reference period for the fourth quarter of 1980. The question might accordingly be raised whether the applicant has any interest at all in proceeding with that submission.

Other important points to be noted are that for a good part of the reference period no delivery programmes existed and that, if the Commission had adopted the applicant's suggestion and endeavoured to take into account the failure to observe minimum prices and voluntary restrictions on deliveries, there is no

doubt that extremely difficult problems of assessment would have been entailed. Furthermore, the introduction of certain adverse legal effects in the context of the system of quotas would have been open to considerable objections under constitutional law, inasmuch as it could have been considered a kind of retroactive sanction.

2. With regard to the inclusion of the month of October in the quota system, I can in principle refer to my observations in the *Rumi* case.

In this connection it was not of course possible to make distinctions according to the conduct of individual undertakings, as the applicant appeared to be suggesting when it argued that, since *it* did not increase its production in October, it was unjust to impose upon it the consequences of the conduct of other undertakings which increased their production in October 1980.

Besides, no undue sacrifices were demanded of the undertakings through the inclusion of October 1980. It is in fact scarcely credible that they were thereby prevented from executing orders for which the delivery dates were extremely flexible and which could in any case be met out of existing stocks. Nor were they prevented, as the applicant's case itself shows, from producing a reasonable amount in November and December 1980 and, as the Commission has properly emphasized, it must not be forgotten that in the winter months production is in any case restricted.

3. Finally, the argument that the Commission failed to observe the principles contained in Articles 2, 3 and 4 is advanced at too general a level and is quite lacking in specification. Moreover, it has long been established in the case-law of the Court that in many situations it is impossible to observe at the same time all the objectives and principles of the Treaty and that it may be appropriate to accord a certain degree of priority to one or more of them, in accordance with the economic circumstances.

IV — Misuse of powers and breach of the principle of proportionality

I now come to a group of submissions, some of which are extremely heterogeneous, and which the applicant has assembled under the heading "misuse of powers and breach of the principle of proportionality".

1. In the first place, the applicant alleges that the measures adopted were not conducive to the aims pursued; as was shown after the first seven weeks, everything remained as it was before and there was nothing to compensate for the increase in production costs as a result of the quota system.

In this regard, the first point to note — a point made in the judgment of 7 February 1973 in Case 40/72 *I. Schroeder KG* v *Germany* [1973] ECR 125 — is that in the circumstances of a case like this an appraisal with the benefit appraising the effectiveness of the measures adopted the decisive point is whether, at the time when they were adopted, it could be assumed that they were clearly not conducive to the aims pursued. However, there can be no

question of that in this case. Further, as the Commission pointed out, the price situation was in fact affected. In fact many undertakings, including manufacturers of concrete reinforcing bars in the Brescia area, were able to increase their prices in the fourth quarter of 1980. If that level could not subsequently be maintained — at the beginning of 1981 prices slumped again, but then rose once more in June 1981 to the level of September 1980 — that merely demonstrates the extent of the crisis, for which a permanent solution naturally could not be found.

2. Secondly, it is argued that no suitable action was taken to counter imports so that traders in non-member countries were able to lay in stocks at lower prices than those prevailing in the Community because of the increased production costs there.

In this connection, with regard to the measures which were in fact adopted, I may direct the Court's attention to the account contained in the Commission's proposal to the Council and also to the observations contained in my Opinion in the *Rumi* case. When in addition it is borne in mind that imports in fact decreased, it is clear even without further explanation that there can be no question in this regard of a violation of the Treaty, and certainly not a *manifest* violation.

3. Thirdly, the applicant submits that the Commission failed to have regard for the difference between integrated undertakings having a complete production cycle and undertakings such as itself which buy crude steel for processing. In addition the Commission failed to appreciate that producers of crude steel, who had to curtail their production, derived no benefit from the fact that demand from non-integrated rolling mills was reduced at the same time.

In answer to this point it must be borne in mind above all that processors of crude steel, such as the applicant, had to restrict production because in that sector too there was a serious crisis. Furthermore, one may, like the Commission, properly raise the question whether this submission is inadmissible, on the ground of lack of interest, since the applicant relies upon the disadvantages which resulted for the *producers of crude steel* from the inclusion of concrete reinforcing bars in the quota system. Besides, it must also be said — if it is assumed that a comprehensive system of quotas was justified — that it is difficult to see how a practical distinction could have been drawn between integrated undertakings and processors of crude steel. Since the applicant has failed to provide any clarification of this point, I see no cause to declare the system of quotas unlawful on that ground.

4. Finally, the applicant considers that a further ground for criticism resides in the fact that exports to non-member countries were not excluded from the system of quotas, which weakened the Community undertakings in those bitterly contested markets. Furthermore, it complained, albeit for the first time in the reply, that quotas were allocated to undertakings which had suspended production. That gave rise to a trade in quotas and conferred an advantage on manufacturers who acquired such quotas.

As regards the last complaint, I will for the sake of brevity refer to my remarks in the *Rumi* case in which such considerations were likewise involved. However, with regard to the influence of the quota system on exports, the Commission not only argued persuasively that no real hindrance existed because the production quotas generally exceeded the volume of exports by a large margin: in addition it emphasized that it would have been fully prepared to increase the quotas on the basis of the exceptional provision contained in Article 14 of Decision No 2794/80 if it had become plain that a manufacturer was prevented by the quotas from increasing his exports to non-member countries.

V — Absence of a manifest crisis and abnormal application of the principle of solidarity

Finally, we have now to examine a group of arguments which, like the previous group, are extremely heterogeneous.

1. The applicant considers that a crisis cannot be said to exist when one part of a sector is organized in a more modern and productive fashion than the rest and that the degree of utilization of plant is in any event no evidence of the existence of a crisis when it is established that the branch in question had been unwisely expanded with the help of public funds. Furthermore, by its nature a crisis within the meaning of Article 58 is transitory, whilst for five years now the Commission has been endeavouring with all kinds of measures to overcome the difficulties which have arisen in the steel sector.

Having regard to all that has been said in another connection regarding Article 58, I do not find this argument capable of establishing that that provision was misapplied.

Thus when the Commission was appraising the situation the significant factor was not the fall in undertakings' profits but the decline in demand which for most undertakings resulted in considerably reduced production. Against the Commission's detailed explanations concerning the situation of the market and its development, the extremely vague and unsubstantiated assertions of the applicant concerning the efficiency of modern producers and the expansion of capacity financed out of public funds cannot, in my opinion, lead to any other appraisal. The same may be said with regard to the transitory nature of a crisis. It is not possible to deduce from the applicant's observations how such a thesis could be demonstrated. Furthermore, it is clear that in this connection the applicant overlooks the fact that it was not until one year ago that Article 58 was employed as a "last resort" and that the Commission had previously endeavoured to overcome the problems which had arisen in cooperation with the undertakings, in principle without recourse to coercion.

2. When the applicant refers in addition to an "abnormal application of the principle of solidarity" I cannot see how the quota system can be defeated in that way.

Proceeding on the basis of the fundamental objectives and principles of the ECSC Treaty, in which mention is made of the most rational distribution of

production at the highest possible level of productivity, the establishment of the lowest prices, the expansion and improvement of production potential, the expansion and modernization of production and the improvement of quality, the applicant considers it indefensible that through the system in question large and outmoded undertakings with uneconomic structures are artifically kept alive, at it were, and that, to that end, modern, and in particular smaller, undertakings which could well withstand competition are required to endure sacrifices which impair their ability to compete. It is also said to be discriminatory that small undertakings on the pattern of the applicant, which are able to present a more flexible response and remain efficient even in difficult times, are accorded the same treatment as large-scale producers under a scheme to overcome a crisis without regard for structural differences.

In this connection all that need be said is that the general objectives and principles of the Treaty do not categorically require the free play of market forces and the acceptance of excessive competition when other goals are thereby jeopardized. As paragraph 80 of the *Valsabbia* decision on minimum prices for concrete reinforcing bars expressly states, exceptions are permitted in special circumstances under the crisis provisions of Article 58. Furthermore, it can hardly be said that the difficulties which have been established stem exclusively from competition from modern business or that the particular objective of the action taken by the Community is to protect outmoded and unprofitable undertakings. The impression given is rather that the sole objective was to overcome the problems of an entire sector of the economy. If, however, the applicant is of the view that a normal application of the principle of solidarity and a non-discriminatory organization of the quota system would have resulted in the exemption of small, modern and competitive undertakings from restrictions on production, it must be informed — since, in view of the scale of the smaller undertakings' production, which it has itself described, that would probably have rendered any Community measures ineffective and would have perpetuated the crisis — that it is clearly proceeding on the basis of a mistaken understanding of the mechanisms laid down in the Treaty for dealing with crises, which nevertheless permitted reorganization in the form of the introduction of new plant by the applicant itself to be taken into consideration.

VI — All this points — and indeed without the need for the preparatory inquiry requested by the applicant — to the conclusion that its application for the annulment of the decision of 1 November 1980, and of Decision No 2794/80 in so far as it constitutes the basis for the former, cannot be granted. It follows that the claim for a declaration that the Commission is obliged to take measures to ensure fair compensation for the damage alleged to have been caused is unfounded, quite apart from the fact that it is impossible to identify from the evidence of the applicant the direct and specific damage caused to it.

VII — I am accordingly of the opinion that the application should be dismissed as unfounded and that the applicant should be ordered to pay the costs.