In Case 234/82

FERRIERE DI ROÈ VOLCIANO SPA, whose registered office is at 24 Via Garibaldi, Roè Volciano (25077), Province of Brescia, acting through its Chairman, Renato Zerbio, a surveyor, and represented by Fabrizio Massoni, with an address for service in Luxembourg at the Chambers of André Elvinger, 15 Côte d'Eich,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Sergio Fabro, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION requesting the Court to declare void the decision of 13 August 1982 by which the Commission, pursuant to Articles 9 and 12 of Commission Decision No 1831/81/ECSC of 24 June 1981, imposed a fine of 75 900 ECU on the applicant for exceeding by 1 012 tonnes the production quota allocated to it for the third quarter of 1981 in respect of products falling within Categories V and VI (reinforcing bars and merchant bars),

THE COURT (Fifth Chamber)

composed of: Y. Galmot, President of Chamber, P. Pescatore, Lord Mackenzie Stuart, O. Due and U. Everling, Judges

Advocate General: G. Reischl
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

A — Outline of the facts

(a) The relevant provisions

In the course of the third quarter of 1980 the Commission decided that the Community steel industry was facing, in the words of Article 58 of the ECSC Treaty, a period of manifest crisis and that the means of indirect action at its disposal had proved ineffective or insufficient to deal with the crisis. It therefore felt obliged to intervene in the production process directly and with mandatory effect in order to re-establish a balance between supply and demand.

Consequently, by Decision No 2794/80 of 31 October 1980 (Official Journal, 1980, L 291, p. 1) it introduced a system of steel production quotas for the fourth quarter of 1980 and the first two quarters of 1981 for undertakings operating in the Community steel industry.

Demand for the principal steel products continued to decline none the less and a slight increase in prices proved to be insufficient in view of the financial burdens incurred by undertakings.

Towards the middle of 1981 it thus became apparent that the European steel industry was still experiencing a period of manifest crisis and that the attainment of the aims set out in Article 3 of the ECSC Treaty was seriously jeopardized.

Consequently, by Decision No 1831/81/ECSC of 24 June 1981 (Official Journal, 1981, L 180, p. 1) the Commission introduced a monitoring system and a new system of production quotas for certain products for undertakings in the steel industry. According to Article 16 of the decision, the new system was to apply from 1 July 1981 to 30 June 1982.

Article 9 of that decision provides that the Commission is to fix each quarter the abatement rates for establishing the production quotas and the part of those quotas which may be delivered in the common market.

The Commission is also to notify each undertaking of its reference production and reference quantities, as well as its production quotas and the part of those quotas which may be delivered in the common market.

Article 11 (2) of the decision provides that, in the case of undertakings which produce only one category, a tolerance of 3 % in excess of the part of their production which may be delivered in the common market is to be allowed within the limit of the production quotas. Article 11 (3) provides that any undertaking which has not exhausted its

production quotas or the part of its quotas which may be delivered in the common market may carry forward to the following quarter up to 5% of those amounts for the same category of product.

Article 12 of the decision provides that a fine, generally of 75 ECU for each tonne in excess, is to be imposed on any undertaking exceeding its production quotas or the part of those quotas which may be delivered in the common market.

In addition, Articles 13 and 14 enable the Commission to adjust the reference production where an undertaking brings into operation new rolling mills as a result of a properly declared investment programme on which the Commission has not delivered a negative opinion or where, because of the scale of the abatement rates imposed in respect of a quarter, the system of quotas creates exceptional difficulties. In order to avail itself of such measures the undertaking in question must make an appropriate request.

Finally, Article 15 states that if "the Commission ascertains ... that undertakings have modified their traditional deliveries to the point of no longer permitting a proper supply to the processors who depended on them, it is to take the appropriate steps to remedy the situation".

(b) The position of Ferriere di Roè Volciano SpA during the third quarter of 1981

During the third quarter of 1981 the Commission allocated to the applicant a production quota of 12 729 tonnes in respect of products falling within Categories V and VI. It is agreed that the applicant exceeded the production quota allocated to it by 1 012 tonnes.

Consequently, by a decision of 13 August 1982 the Commission imposed a fine of 75 900 ECU on Ferriere di Roè Volciano.

B — Written procedure

On 17 September 1982 Ferriere di Roè Volciano brought an action seeking to have the Commission's decision of 13 August 1982 declared void.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the Court decided to write to the parties in the following terms, requesting them to reply before the hearing:

"A — The Commission of the European Communities is requested to reply in writing before 1 May 1983 to the following questions

(a) General information

1. The Commission is requested to produce the communications whereby it informed Ferriere di Roè Volciano of its production quotas from the fourth quarter of 1980 to the fourth quarter of 1981.

2. The Commission is requested to produce the declarations received from the undertaking relating to production of rolled products during those quarters or, in the absence of such declarations, all the information relating to the under-

taking's steel production during the period in question of which the Commission is aware.

(b) The existence of an infringement

3. What conclusions does the Commission draw, with regard to the system of production quotas and the existence of an infringement, from the fact that the applicant claims to be the only Italian processor of steel products which operates exclusively on behalf of others and which has experienced special difficulties on that count? Does the Commission consider that the provisions of Article 15 of Decision No 1831/81/ECSC, in particular, are capable of being applied in this case?

4. The Commission is requested to give a detailed reply to the applicant's submission relating to the applicability of Article 11 (2) and (3) of Decision No 1831/81/ECSC (tolerance of 3% in excess of production quotas in the case of undertakings which produce only one category and ability to carry forward up to 5 % in the case of undertakings which have not exhausted their quotas).

(c) The application of adjustments provided for in Decision No 1831/81 ECSC of 24 June 1981

5. Was a request made to the Commission by the undertaking for application of the provisions of Articles 13 and 14 of the said decision (adjustment of the reference production as a result of a properly declared investment programme or on the ground of exceptional difficulties encountered by an undertaking)?

(d) The method of calculating the fine

6. Article 12 of Decision No 1831/81/ECSC provides that the fine is generally to be 75 ECU per excess tonne for ordinary steel. Is it the practice of the Commission to vary the amount of the fine according to the undertaking's ability to pay and in particular in view of the exceptional difficulties which it may encounter?

7. The Commission is requested to comment on the applicant's claims concerning the method of calculating the fine and in particular on the following points:

Is the method of calculating the fine the same in the case of steel producers as it is in the case of undertakings which merely process steel?

In the case of the latter undertakings, does the Commission interpret Article 58 of the ECSC Treaty as meaning that the amount of the fine is limited to the value added as a result of the processing?

Can the Commission comment fully on the undertaking's claim that the fine should be reduced from 75 900 ECU to 57 684 ECU?

In particular the Commission is requested to reply fully to the undertaking's letter dated 5 October 1982, which it received by 18 February 1983 at the latest."

"B — The applicant is requested to reply in writing before 1 May 1983 to the following questions

(a) General information

1. The applicant is requested to specify the exact nature of its operations, in particular during the third quarter of

1981, subdividing them, if possible, by sector (production, processing etc.), and to produce all supporting documentary evidence.

2. The undertaking is requested to specify its production levels for each month of 1980 in respect of products falling within Categories V and VI (reinforcing bars and merchant bars).

3. Are Ferriere San Carlo SpA and Ferriere di Roè Volciano SpA completely separate companies or is there an economic or financial relationship between them?

(b) The existence of an infringement

4. The undertaking is requested to produce all supporting documentary evidence concerning its submission that the contested decision infringed Article 11 (2) and (3) of Decision No 1831/81/ECSC.

5. Did the undertaking submit a request to the Commission for the application of the provisions of Article 5 of Decision No 1831/81/ECSC?

(c) The application of adjustments provided for in Decision No 1831/81/ECSC

6. Did the undertaking submit a request to the Commission for the application of Articles 13 and 14 of Decision No 1831/81/ECSC?

(d) The method of calculating the fine

7. The undertaking is requested to produce all the information necessary in order to calculate the value added (per tonne) to rolled products by its processing operations during the third quarter of 1981.

8. The undertaking is requested to produce any information that would substantiate its claim that payment of the fine would have serious consequences for it and might have led to its insolvency."

By order of 9 March 1983 the Court assigned the case to the Fifth Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

II — Conclusions of the parties

The applicant claims that the Court should:

(a) Primarily:

Declare that the applicant is not required to pay the fine imposed upon it by the decision of 13 August 1982;

(b) In the alternative:

If the Court takes the view that a fine should be imposed on the applicant, reduce the fine to a more modest figure, to be determined at the Court's discretion,

(c) Make an appropriate order as to costs.

In its reply the applicant also claims that the Court should:

Declare that interest at the rate of 1% a month is sufficient for the fines imposed during 1982; and

Order the defendant to pay the costs.

The Commission contends that the Court should:

(a) Dismiss the action as unfounded; and

(b) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — The applicant's submissions with regard to the imposition of a fine in principle

1. The submission that the contested decision failed to comply with the provisions of Article 14 of Decision No 2794/80/ECSC and of Articles 3 and 4 of the ECSC Treaty

(a) The *applicant* maintains that the contested decision disregarded the aforementioned provisions and that the financial burden it would have to bear as a result of the fine imposed would lead to its insolvency, which is clearly contrary to the provisions of Article 3 of the Treaty.

It adds in its reply that in view of the terms of Articles 3 (a) and 4 (b) of the ECSC Treaty it cannot be regarded as having infringed the letter or the spirit of the Treaty because it never had access to the market and was therefore not able to injure competing undertakings in any manner.

It considers, furthermore, that it was the victim of discrimination since it was not allocated delivery quotas and therefore had no access to the market despite repeated requests.

Since that situation has changed since 20 November 1982 the applicant considers that it need not claim damages but requests that "its compliance with its civic duties and its spirit of solidarity in relation to competitors established in the Member States of the EEC be recognized".

(b) The *Commission* refutes the argument submitted by the applicant.

First, it points out that no details were given to support the assertion that the financial burden which the applicant would have to bear as a result of the fine would lead to its insolvency.

Secondly, the Commission considers that it is clear that the fine which it imposed could not infringe Article 3 of the Treaty, even if it did lead to the applicant's insolvency.

Thirdly, the Commission maintains that Article 3 of the ECSC Treaty forms part of the general description of the aims of the Community, that it is impossible to attempt to realize all of those aims at the same time and that therefore it is the Commission's duty to combine them and to make a choice between them, especially at a time of crisis.

The purpose of Decision No 1831/81 was to re-establish a balance between supply and demand for the products in question, which was a necessary preliminary requirement for the attainment of all the other objectives.

It follows that Article 3 cannot prevent the Commission from imposing appropriate pecuniary sanctions on undertakings which do not comply with its decisions.

2. The submission that the contested decision is illegal because it is inequitable

(a) The *applicant* maintains that it is contrary to the most elementary concept of equity that a small undertaking, whose profitability is secured by sound management, should be penalized for having produced and sold, during a period of 12 months, a quantity of goods

which did not exceed the aggregate of the quotes allocated to it.

It adds in its reply that it would encounter serious difficulties in providing a guarantee for the payment of a fine of 75 900 ECU in view of its small registered capital, the large debts owed to banks and suppliers and its low profits. A fine of such an amount would force a small undertaking in the nature of a craft industry, such as the applicant, to close its doors and dismiss its workforce.

(b) The *Commission* considers that in this case the fine was fixed in proportion to the seriousness of the infringement and that any excess production must be penalized by a fine calculated by reference to each excess tonne.

It is clear, according to the Commission, that in the context of the system of production quotas for steel the size of an undertaking is irrelevant and regard is had solely to the seriousness of the infringement.

Thus a fine must be in the nature of a sanction and the fact that, in the final analysis, the penalty may have unexpected results, such as insolvency, cannot alter the equitable and necessary character of the system.

Secondly, the Commission considers that although the applicant relies on the concept of equity such a principle does not apply in this case: the Court has always held that the principle of equity may only be used in the absence of any relevant legal provision or where a provision contains a lacuna, which is not so in this case.

Thirdly, the Commission points out that, since Decision No 1831/81 provides for quarterly quotas and penalizes any infringement of those quotas, reliance on annual production cannot invalidate a decision imposing a fine for infringement of a quarterly quota.

3. The submission that the contested decision is illegal because it fails to take account of the fact that the excess production was not sold but put into storage

(a) The *applicant* states in its application that the products representing the excess production for the quarter in question were stored at its premises and were not sold. Consequently, competing undertakings established in the EEC were not injured.

In its reply the applicant offers to show by means of an inspection *in situ* that the products were indeed stored until November 1982, when it was allocated delivery quotas for the first time and was finally able to put its products on the market.

It also states that it is the sole undertaking in Italy which operates exclusively as a processor of steel products and works solely on behalf of others. As a result of the present economic situation its customers are processing their products themselves, thereby depriving it of the opportunity to use its production capacity and forcing it to obtain delivery quotas.

In the applicant's opinion that justifies its release from the fine imposed on it by the decision of 13 August 1982.

(b) The *Commission* considers that line of argument to be irrelevant because the

Community legislation disregards the fact that the excess products were not sold but put into storage and takes into account solely the quantity of goods produced.

4. The submission that the contested decision failed to comply with Article 11 (2) and (3) of Decision No 1831/81

(a) In its application the *applicant* stated that since it operated as a processor on behalf of others its production quotas were very low and that it therefore misinterpreted Article 11 (2) and (3) of Decision No 1831/81, believing in good faith that it could take advantage of tolerances of 3% and 5% in excess of its quotas.

In its submissions, as finally amended by its reply, the applicant takes the view that its production did not exceed the quotas allocated to it for the third quarter of 1981 if account is taken of the arguments put forward in a letter dated 4 March 1982 which it produced with its application.

In fact it regards itself as entitled to the 3% tolerance margin accorded to undertakings which produce only one category of product, of which it is one; it also claims to be entitled to carry forward 5% of its quotas, as in the case of undertakings which have not exhausted their quotas.

It adds that since Decision No 1831/81 came into force at the latest on the date on which it was published, namely 1 July 1981, it would appear difficult to maintain that Article 11 (2) and (3) thereof did not apply in this case to the third quarter of 1981.

In any case, and in the alternative, it requests the Court to take account of the provisions of Article 14 of Decision No 2794/80/ECSC, of Articles 14 and 15 of Decision No 1831/81/ECSC and Articles 14 and 17 of Decision No 1696/82/ECSC.

(b) In its defence the *Commission* maintains that the argument based on the undertaking's good faith cannot be put forward in this case since the provision in question is sufficiently clear to be understood by the persons affected by it.

Moreover, it was open to the applicant to address a direct inquiry to the Commission's departments in order to obtain any necessary information.

In those circumstances the applicant was, at the very least, at fault in its conduct, thereby providing ample justification for the fine.

In its rejoinder the Commission failed to reply to the applicant's submission in its final form.

5. The allegations that the applicant exceeded its quota for the fourth quarter of 1981

(a) Originally the *applicant* stated that the Commission alleged that it had also exceeded by 398 tonnes its quotas for the fourth quarter of 1981 and that that issue should be dealt with together with this one, but it accepted in its latest submissions that that question had been resolved by a letter from the Commission dated 15 October 1982.

(b) The *Commission* takes the view that, in any event, there is no need to reply to arguments relating to the fourth quarter of 1981 instead of to the third quarter, which is the subject of the contested decision, especially as the

applicant's arguments are inconsistent in that respect.

B — Submissions with regard to the amount of the fine

1. The *applicant* contends that it follows from Article 58 of the Treaty that the amount of the fine may be no higher than the value of the excess production.

In this case it has been fined LIT 99 075 per tonne, whereas, according to its calculations, it only received, as a processor, LIT 75 307 per tonne.

Consequently, even if the Court considers the imposition of a fine to be justified in principle, the amount of the fine should be reduced from 75 900 ECU to 57 684 ECU, that is to say LIT 76 200 564.

2. The *Commission* states first that it never received the applicant's letter informing it of those calculations.

Secondly, it states that it is not able to comment on that argument in the absence of any evidence having the slightest probative value.

Finally, it refers to its comments in that connection in Case 235/82.

C — Submissions with regard to the rate of interest to be applied to the fine

1. The *applicant* maintains that the rate of interest stipulated in the contested decision — namely, 1% for each month by which payment is delayed — is the normal rate in the Benelux countries and that it would be in the interests of the proper administration of justice for the Court to lay down the rate of interest in respect of fines imposed by the Commission.

In fact, according to the applicant, the Commission would like to charge interest varying according to the country in question and the rate for Italy would be around 22% *per annum*. Such a decision would treat undertakings from different Member States differently and would be contrary to Articles 3 and 4 of the ECSC Treaty.

Thus the Court should declare that a rate of interest of 1% a month is sufficient for fines imposed during 1982.

2. The *Commission* states that the decision amending the system of interest rates and time-limits for payment is still under consideration and that, as it has not been published, it cannot adversely affect the applicant.

In any event, the Commission states that a variable rate of interest would not treat undertakings from different States differently but would in fact be designed to put an end to the current situation which gives unjustified advantages in that respect to certain undertakings as a result of the different interest rates applicable in the different Member States.

IV — Replies of the parties to the questions put by the Court

A — The Commission's replies

Questions 1 and 2: The Commission produced the documents requested.

Question 3: The Commission maintains that Ferriere di Roè Volciano is not the only undertaking which operates exclusively as a processor of its customers' materials. The undertaking's

difficulties in operating solely as a processor arise in relation to deliveries (the part of the quota which may be delivered on the common market) and not in relation to production.

The production quotas are, in fact, allocated to the processor and not to the undertaking placing the orders. Consequently, according to the Commission, Ferriere di Roè Volciano possesses production quotas regardless of whether it receives processing ordes.

Nevertheless, the Commission recognizes that difficulties may arise with regard to deliveries. In that respect Article 8 (3) of Decision No 1696/82 enables parts of quotas to be delivered in the common market by undertakings whose processing contracts have come to an end and who therefore find that, in order to continue production, they must themselves deliver in the common market. The applicant benefited from that provision and was allocated additional quotas on 18 November 1982. However, according to the Commission, that possibility did not exist before July 1982 and, furthermore, neither the applicant nor any other undertaking informed the Commission of such difficulties.

The Commission takes the view that Article 15 of Decision No 1831/81 could not be applied in this case. That provision was intended to ensure that processors (operating on their own account and not on behalf of others) were properly supplied if their suppliers reduced their deliveries to an unusual extent as a result of the quotas.

In fact, in the applicant's case the supplies consisted of billets, a semi-manufactured product not covered by the system; in any event, Article 15 would merely have made it possible to allocate an additional quota to the applicant's suppliers so as to enable the applicant to fulfil its quota in respect of processed products.

Question 4: The Commission points out that Article 11 (2) of Decision No 1831/81 accords undertakings which produce only one category a 3 % tolerance margin only as regards the part of the quota which may be delivered on the common market and only within the limits of the production quota.

The justification for that measure is that such producers, unlike producers who diversify their production, do not have the possibility of making up for excess production (of up to 3 %) in one category by reducing production in another category.

Accordingly, it was provided that they should have such a possibility of exceeding the quotas by delivering in the common market part of their production intended for export.

Nevertheless, it is not the intention of that provision to enable the total production quota to be exceeded, as is provided in Article 11 (1) in respect of producers as a whole.

The Commission also observes that Article 11 (3) of Decision No 1831/81, which enables up to 5 % of the production quotas or the part thereof which may be delivered in the common market to be carried forward to the next

quarter, is intended to make the system more flexible so as to take into account the practical difficulties involved in adapting the rhythm of production and sales precisely to the quarterly quotas.

The same flexibility was to be found in the preceding decision, Decision No 2794/80, which was in force until 30 June 1981.

However, under that decision the provisions for carrying forward were different since the quotas related to a different categorization of products and it was possible to carry forward to the following quarter up to 50 % of the unused part of the quota.

According to the Commission, the differences in that system relating to carrying forward and to the definition of the products established a clear separation between the system provided for in Decision No 2794/80, which was in force until 30 June 1981, and the system provided for in Decision No 1831/81, which came into force on 1 July 1981.

The Commission therefore concludes that it was not possible to carry forward any unused part of the quota for the second quarter of 1981 to the third quarter of that year.

Question 5: The Commission states that the undertaking made no request for the application of Article 14 of Decision No 1831/81.

On the contrary, on 15 October 1981 the applicant made a request for the application of Article 13 as a result of a properly declared investment programme.

In response to that request the applicant's quotas were adjusted by an individual decision of 11 March 1982.

Question 6: The Commission states that, as a general rule, the fine only varies in relation to the amount by which the quota is exceeded, thus ensuring the effectiveness of the system.

Only such a strict and automatic application of the rules avoids discrimination between undertakings which would undermine the quota system.

Exceptional difficulties for an undertaking are taken into account by the granting of additional quotas (Article 14 of Decision No 2794/80) rather than at the stage of fixing the penalty.

The Commission also takes account of exceptional difficulties which may arise from the level of the fine by granting a period within which to pay in certain cases.

With regard to an undertaking's ability to pay, that is only taken into account in so far as an undertaking which has been declared insolvent is fined at a rate of one ECU per excess tonne.

Question 7: The Commission replied to the different parts of this question as follows:

The methods of calculating the fine are the same for steel producers and for firms which only operate as processors. In fact, the purpose of the quota system is to limit production regardless of the production methods or stages.

The figure of 75 ECU per excess tonne was fixed in such a manner that undertakings have no interest in exceeding the

quotas allocated to them: they should neither make a profit from the excess tonnage nor be encouraged to reduce their losses by production above the quota. Moreover, the figure of 75 ECU was fixed on the basis of an "average integrated undertaking" and the intention is to deprive it of the benefit brought about by the reduction in its fixed costs as a result of each tonne produced in excess of the quota.

Such justification does not mean that every fine must be in proportion to the benefit obtained by the undertaking being fined, since that might lead to the fine's ceasing to apply. Moreover, the amount of the fine cannot be limited to the value added by the processing operation.

In the first place, the value added depends on a number of factors and varies according to the product processed and, secondly, there are not merely two types of steel undertakings (producers and processors) but a whole range of undertakings.

In the Commission's opinion, the automatic nature of the penalty raises the question whether the penalty is in proportion to the infringement.

According to the Commission, every tonne produced in excess contributes to the imbalance between supply and demand and is therefore contrary to the aims of the system.

Furthermore, a processor takes the risk of being fined with full knowledge, since it is informed in advance of the rate of fine laid down in the first paragraph of Article 9 of Decision No 2794/80.

The Commission adds that Article 58 of the ECSC Treaty permits the imposition of "fines not exceeding the value of the tonnages produced in disregard" of its decisions, regardless of the way in which the tonnages were produced and therefore without relating the amount of fine to the value added by the processing operation.

In this case the value of the excess production (finished products) was far higher than the amount of the fine (225 ECU per tonne against 75 ECU).

The Commission considers that the criterion based on the value added or the profit margin cannot be used for the simple reason that it makes the imposition of a fine very difficult and in some cases even impossible.

Finally, with regard to the applicant's letter of 5 October 1982, the Commission simply notes that the figures cited in the letter correspond roughly to the average income of a rolling mill concerned with such processing operations.

B — The applicant's replies

Question 1: The applicant states that it produces one category of product only and that its work relates almost exclusively to reinforcing bars.

Question 3: The applicant states that there is no economic or financial relationship between itself and Ferriere San Carlo SpA.

Question 5: The undertaking admits that it made no direct request for the application of Article 15 of Decision No 1831/81 but it considers that Article 15 could have been applied by the Commission on the basis of the letter dated 4 March 1982 sent by it to the Commission.

Question 6: The applicant states that as early as 15 October 1981 it asked the Commission for an adjustment of its quotas to take into account its new production capacity following the bringing into operation of a new rolling mill. That request was granted in part inasmuch as its reference production was increased from 72 740 tonnes *per annum* to 91 400 tonnes *per annum.*

Subsequently, by letter of 22 November 1982, it requested a further adjustment of its quotas under Article 14 of Decision No 1696/82/ECSC, as amended and extended by Decision No 2751/82/ ECSC.

As a result of that request the Commission granted a provisional adjustment of the reference production on 20 December 1982 and, in view of the fact that the decision was not notified until 3 January 1983, the Commission allowed the whole of the additional quota to be carried forward to the first quarter of 1983.

A further request for adjustment in respect of the second quarter of 1983 is being considered at the present time.

Question 7: In order to prove the value of the processing operations the applicant states that in the third quarter of 1981 the total amount invoiced to customers was just over LIT 72 per kg as opposed to an average of just over LIT 75 for the whole of 1981. It attaches an annex containing a month-by-month summary of the value of its processing operations invoiced to each customer.

Question 8: The applicant produced various documents and accountancy vouchers to prove that a further burden in the form of a fine would aggravate its financial position to such an extent that it would have no option but to suspend payment of its debts, put its affairs in the hands of the court or completely close its factory.

V — Oral procedure

At the sitting on 21 September 1983 oral argument was presented by Fabrizio Massoni, Avvocato, for the applicant, and by Sergio Fabro, acting as Agent, for the Commission.

The Advocate General delivered his opinion at the sitting on 26 October 1983.

Decision

1 By an application lodged at the Court Registry on 17 September 1982 Ferriere di Roè Volciano SpA brought an action under the second paragraph of Article 36 of the ECSC Treaty challenging the Commission's decision of 13 August 1982 imposing a fine on it under Article 58 of the ECSC Treaty and under Commission Decision No 1831/81/ECSC of 24 June 1981

establishing for undertakings in the iron and steel industry a monitoring system and a new system of production quotas in respect of certain products (Official Journal, 1981, L 180, p. 1).

2 The contested decision states that in breach of the aforementiond Decision No 1831/81 the applicant exceeded by 1 012 tonnes the production quota allocated to it by the Commission for the third quarter of 1981 in respect of products falling within Categories V and VI. It therefore imposes on the applicant a fine of 75 900 ECU (1 012 × 75), equivalent to LIT 100 284 193.

3 The applicant seeks primarily to have the contested decision declared void or, in the alternative, to have the fine reduced. It also requests the Court to declare that a rate of interest of 1% for each month by which payment of the fine is delayed is satisfactory.

4 In support of its claim that the decision should be declared void the applicant argues that the contested decision fails to comply with Article 14 of Decision No 2794/80/ECSC and with Articles 3 and 4 of the ECSC Treaty, that the principle of equity was infringed, that the products produced in excess of the quotas were put into storage and not put on the market until November 1982, and that the contested decision disregarded the fact that the applicant was entitled under Article 11 (2) and (3) of Decision No 1831/81, to carry forward part of its quotas and to exceed the quotas by a small margin.

5 The Court considers it necessary to examine first the submission that the contested decision disregarded the applicant's entitlement to carry forward part of its quotas to the next quarter.

6 Article 11 (3) of Decision No 1831/81 is worded as follows:

"Any undertaking which has not come to the end of its production quotas or of the part of its quotas which may be delivered on the common market may carry forward into the ensuing quarter up to 5% of, as the case may be, their quotas or part of quotas for the same category of product."

7 The applicant maintains that by virtue of that provision it was entitled to carry forward to the third quarter of 1981 a proportion of the 2 512 tonnes of the quota which it did not use up during the second quarter of 1981, provided that the amount carried forward did not exceed 5% of the quota of 12 729 tonnes allocated to it for the third quarter of 1981, that is to say 636 tonnes. The excess production with which it is charged is thereby reduced to 376 tonnes.

8 The Commission rejects that argument and contends that it was not possible to carry forward production quotas from the second quarter of 1981 to the third quarter of 1981 by reason of the changes made to the preceding system by the new general decision, Decision No 1831/81, which came into force on 1 July 1981. The Commission emphasizes, first, that that decision introduced new rules for calculating the amount which may be carried forward: under the system established by Decision No 2794/80 up to 50% of the unused part of the quota could be carried forward to the following quarter, whereas Decision No 1831/81 enables up to 5% of a quota, or of the part of a quota which may be delivered in the common market, to be carried forward where the quota or part of the quota has not been exhausted. Secondly, Decision No 1831/81 provided a new classification of steel products: Group IV, defined in Article 2 of Decision No 2794/80 as covering "light sections (coiled wire rod, concrete reinforcing bars and other merchant bars)", was subdivided into three new categories by Article 1 of Decision No 1831/81 (Category IV: wire rod, Category V: reinforcing bars, Category VI: merchant bars).

9 It should be noted, as the Commission has itself recognized, that the possibility of carrying forward to the following quarter all or part of the unused portion of a quota allocated for the previous quarter expresses the Commission's wish to make the application of the general system of production quotas more flexible, so as to take into account the difficulties encountered by producers in adapting the rhythm of their production to a system of quarterly quotas.

10 It must be noted, moreover, that all the general decisions adopted by the Commission since 1980 establishing the successive systems of production quotas for steel which have applied since the fourth quarter of 1980 made provision for such carrying forward from one quarter to the next. More

specifically, Decision No 1831/81 did not contain any provision excluding the possibility of carrying forward unused quotas from the second quarter of 1981 to the third quarter.

11 In those circumstances the Commission was under a duty to ensure, for the benefit of every producer, the continuity of the system of carrying forward quotas between the second and third quarters of 1981, at least in so far as the amendments made by Decision No 1831/81 to the system which had previously been in force did not make it technically impossible to calculate the amount which the producer in question was entitled to carry forward. The relevance of the arguments put forward by the Commission in its defence must be examined in the light of that duty.

12 In that respect, it must be noted that no difficulties of a technical nature prevented Article 11 (3) of Decision No 1831/81 from being applied in favour of the applicant.

13 In fact, the Commission's first argument, based upon the alteration in the method of calculating the amount which may be carried forward, is without substance, since that alteration does not, of itself, prevent the amount to be carried forward from being calculated on the basis of the new provisions.

14 Secondly, with regard to the argument concerning the new classification of steel products established with effect from the third quarter of 1981, it is sufficient to note that the undertaking in question produced only one category of product during the second and third quarters of 1981, namely concrete reinforcing bars. The fact that such bars were originally classified in Group IV by Decision No 2794/80 and were then placed in Category V by Decision No 1831/81 did not make it impossible, or even more difficult, to calculate the amount of the quota which the applicant was entitled to carry forward.

15 It would appear, in those circumstances, that the applicant was entitled to carry forward to the third quarter of 1981 part of the unused portion of the quota allocated to it for the second quarter of 1981, within the limit set by Article 11 (3) of Decision No 1831/81, that is to say up to 5% of the quota allocated for the second quarter of 1981.

16 In fact, it is clear from the evidence, first, that the Commission informed the applicant on 6 April 1981 that it had been allocated a quota of 13 789 tonnes for the second quarter of 1981 in respect of products falling within Group IV and, secondly, that its production of reinforcing bars in that quarter only amounted to 11 217 tonnes, which figure has not been disputed. The unused portion of the quota allocated for that quarter therefore amounts to 2 512 tonnes.

17 Consequently, the applicant was entitled to carry forward a proportion of that amount not exceeding 5% of the quota of 13 789 tonnes, that is to say 689 tonnes.

18 As a result the amount which it produced unlawfully in excess of its quota is reduced from 1 012 tonnes to 323 tonnes.

19 As the Commission itself admitted at the hearing, it follows a well established practice, in relation to all undertakings in the steel industry, of waiving the imposition of a fine where an undertaking infringes the quota system for the first time and exceeds its quota by less than 500 tonnes.

20 It is accepted that the two conditions upon which the operation of that practice depends are satisfied in this case.

21 Consequently, the Commission was precluded from imposing a fine on the applicant by virtue of the principle of equality, which requires that similar situations should not be treated differently, unless different treatment can be justified objectively, which is not the case here.

22 From the whole of the foregoing, and without its being necessary to consider the other submissions pleaded, it follows that the applicant was justified in seeking a declaration that the contested decision imposing a fine on it was void.

23 Accordingly, the submissions pleaded in the alternative for the reduction of the fine and the submissions concerning the rate of interest applicable to fines imposed in 1982 have lost their purpose and it is therefore not necessary to give a ruling on them.

Costs

24 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. As the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares void the Commission's decision of 13 August 1982 imposing a fine of 75 900 ECU on Ferriere di Roè Volciano SpA; and**

2. **Orders the Commission to pay the costs.**

Galmot Pescatore

Mackenzie Stuart Due Everling

Delivered in open court in Luxembourg on 30 November 1983.

For the Registrar

H. A. Rühl

Principal Administrator

Y. Galmot

President of the Fifth Chamber