On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Reduces the amount of the fine imposed on the applicant to 205 800 ECU (LIT 272 349 546);**

2. **Dismisses the remainder of the application;**

3. **Orders the parties to bear their own costs.**

Galmot Mackenzie Stuart

Due Everling Kakouris

Delivered in open court in Luxembourg on 19 October 1983.

J. A. Pompe
Deputy Registrar

Y. Galmot
President of the Fifth Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 14 JULY 1983 [1]

Mr President,
Members of the Court,

The applicant in the proceedings to be dealt with today, an undertaking manufacturing steel products in three plants (Casto, Sarezzo and Settimo), was informed in a letter from the Commission dated 19 December 1980 of its production quotas for the first quarter of 1981 for crude steel and products of Categories II and IV on the basis of Decision No 2794/80 (Official Journal,

1 — Translated from the German.

L 291, 31. 10. 1980, p. 1) which is known to the Court from many previous cases. By notice dated 23 February 1981 the applicant's crude steel quota was increased; moreover, the quota for products of Category IV was increased by the purchase of quotas from other undertakings, as the Commission was informed by letter dated 25 March 1981, and by the carrying-over of the unused quota for the last quarter of 1980 to the first quarter of 1981 pursuant to Article 8 (2) of Decision No 2794/80.

On the expiry of the first quarter of 1981 it was apparent that the applicant had produced more than was definitively allotted to it under the quota system. The applicant thinks that its regular reports to the Commission showed that the quotas for Category II had been exceeded by 1 157 tonnes and for Category IV by 4 331 tonnes, that is 5 488 tonnes altogether. The Commission, on the other hand, contends that it had established on the basis of the reports from its inspectors that the applicant had not exhausted its quota for products of Category II whereas excesses in Category IV (taking into account the excess margin under Article 8 of Decision No 2794/80) amounted to the 5 488 tonnes mentioned by the applicant as a total figure.

The applicant itself drew the Commission's attention in a telex of 7 April 1981 to the fact that it had exceeded the quota. It contended that it had programmed the necessary closure of its plants immediately after being told of the quota and had informed the trade unions thereof; because of a modification to the rolling mill in Casto however, more had been produced in the second half of March than had been programmed, and that was unforeseeable. Moreover, it stressed in the telex message that the greater part of the excess production had been stored, that is, that it had not been used for further deliveries, and that it would reduce its production from April 1981 to offset the excess.

The Commission did not at first react. Only on 19 January 1982 did it send a letter to the applicant in which it observed that according to reports of the Commission's inspectors the applicant had exceeded its production quota for products of Category IV by 5 488 tonnes; and that that meant, in application of Article 9 (1) of Decision No 2794/80, a penalty of 411 600 European currency units (75 ECU per excess tonne).

As requested by the Commission, the applicant gave its comments in a letter dated 1 February 1982. It referred once again to the fact that as a result of the commencement of production in the modified plant at Casto there had been an unforeseeable increase in production and it had not been possible to extend the closures of plant agreed with the trade unions to cope with the said circumstances. Moreover, the additional production was of universal plate where there was no problem and which has since no longer been included in the compulsory quota system. Finally it was necessary to take account of the total production for 1981.

After hearing the applicant of 18 March 1982 the Commission took a decision on 11 June 1982 pursuant to Article 9 of Decision No 2794/80 in which a penalty of 411 600 ECU (equalling LIT 544 699 092) was imposed for exceeding the production quota for Category IV in the first quarter of 1981 by 5 488 tonnes and it was provided that the penalty was to be paid within a period of two months from notification of the decision.

Thereupon the applicant brought the matter to the Court on 16 July 1982 and claimed that the decision of 11 June 1982 should be declared void and alternatively that the fine should be reduced to a symbolic amount or at least a much smaller amount than that laid down in the decision.

The Commission does not consider the arguments adduced in support to be well founded. My opinion thereon is as follows:

1. First submission

The applicant relies here on Article 58 (4) of the ECSC Treaty which reads:

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

It follows, it is claimed, that the Commission has a discretion which it must exercise. It is accordingly not permissible automatically to impose uniform fines such as provided in Article 9 of Decision No 2794/80 in the following terms:

"Firms exceeding their production quota or that part of this quota which, under Article 7 (2) and (3), may be delivered within the common market, shall be fined. This fine shall generally be 75 ECU per tonne of excess for ordinary steels and 150 ECU per tonne of excess for special steels."

If however such a fine, which must be regarded as a maximum fine, is imposed, a reason therefor must be given. No such reason has been given in this case and therefore the contested individual decision must necessarily be declared void.

Against that the Commission contends that it has limited its own discretion in the said Article 9 and, contrary to the applicant's view, that is possible not only in a provision of equal rank to Article 58 of the ECSC Treaty. The reason therefor is given in Recital 9 in the preamble to Decision No 2794/80 which states:

"In order to ensure the effectiveness of the quotas system, it will be necessary for any excess to be fully sanctioned by means of a fine based on each excess tonne produced."

If accordingly it automatically imposes uniform penalties, they cannot be regarded as *maximum* penalties, and therefore it is not necessary to give any reason why lesser penalties are not imposed.

On that issue I agree with the Commission.

There is no doubt that the effect of the first paragraph of Article 9 of Decision No 2794/80 on the system of sanctions in the decision on steel quotas is to exclude, if not absolutely automatically, nevertheless *on principle* the exercise of discretion. That is clearly apparent from the preamble to the decision and it is not possible to draw any different conclusion from the use of the expression "generally" in the first paragraph of Article 9 which in my view must be read in conjunction with the second paragraph.

Moreover, I cannot see how exception can be taken to that. On the one hand it is clear, and the Commission has shown this with the production of figures concerning the value of the production involved, that the penalty imposed is within the limits laid down by Article 58 (4) of the ECSC Treaty. Further I think

too that the Commission is not failing to have regard to the rule in Article 58 if, in applying it, it resolves in principle to restrict its freedom in assessing the fine. This is not really a strictly automatic reaction because the Commission in certain extreme cases mentioned in the said reply departs entirely from the rule contained in the first paragraph of Article 9. Further it must not be forgotten that Article 58 (4) of the ECSC Treaty is intended to ensure that the purposes of that article are fulfilled and it must be interpreted accordingly. That may well lead to the view, however, that if the quota system is to be effectively guaranteed a certain automatic approach is to some extent required as far as the rules on fines are concerned, accompanied by a restriction on the Commission's discretion, so that the firms concerned do not have the impression that infringements of the quota system may in certain conditions — regard being had to all kinds of circumstances which may be taken into account — lead to only quite insignificant penalties.

Thus it cannot be objected that the laying-down in principle of a uniform fine in the first paragraph of Article 9 of Decision No 2794/80 is incompatible with Article 58 of the ECSC Treaty. It is thus also clear that no statement of reasons can be demanded for not departing from the rule in an individual case by reason of circumstances which the Commission does not consider significant. The decision at issue here, whose statement of reasons does in fact deal with the alleged technically unforeseeable production in the plant at Casto, cannot therefore be annulled on the ground of failure to state reasons.

2. Second submission

Further the applicant complains that the Commission in issuing its decision imposing a fine did not take into account a number of special circumstances which in any event ought to have given ground for not imposing a penalty or fixing a lesser fine.

Thus it gave notice itself in the said telex message of 7 April 1981 that it had exceeded the production quota. Further it had programmed its production correctly in accordance with the quotas allotted to it; the surplus production which had arisen from the second week in March was due to the fact that after the modified rolling-mill in Casto started production at the beginning of March it did not work, as was generally assumed, at merely a third of its capacity but immediately produced double, that is, the optimum. Moreover, the applicant was bound by agreements with the trade unions and with firms which had provided the new plant in Casto and was therefore not able to react to the unforeseeable occurrence of the additional production in Casto by prematurely restraining production. For that reason it was also not possible prematurely to stop the Casto mill because otherwise defects would not have been discovered or the necessary corrections made in due time.

It is true that against those contentions it is not possible to accept the Commission's argument that under Article 9 of Decision No 2794/80 all that is relevant is the result (exceeding the quotas) whilst considerations in relation to a guilty intent — intentional or negligent exceeding of the quotas — or mitigating circumstances must be left out of account. That would not be

compatible with the fact that Article 58 (4), pursuant to which Article 9 of Decision No 2794/80 was adopted, contains a genuine power of sanction which certainly requires the Commission to have regard to general principles of law in relation thereto. In the last resort, however, it is not possible to regard the circumstances put forward by the applicant as having any influence on the penalty requiring in consequence a statement of reasons.

(a) That certainly applies to the fact, which might at most be described as "mitigating circumstances", that the applicant itself immediately gave notice of exceeding the quota. That is unimportant because, as in other plants, since the end of 1980 the Commission's agents had been continually present at the applicant's plant and could accordingly very quickly, possibly even before the said telex message was dispatched, learn of the surplus production from the current checks on the applicant's output and the reports which must regularly be given regarding it. The applicant's voluntary notification thus did not contribute to facilitating the operation of the quota system.

(b) When the applicant further refers to the correct programming of its production flow after notification of the production quotas and the unforeseeability of the additional production in the modified plant at Casto, it must be observed on the one hand that the programming and the associated agreements with the trade unions about temporary closing of plant apparently occurred already in January 1981, as was explained at the hearing. For that purpose, however, the basis was a production quota of some 67 000 tonnes since the production quota was increased to 74 000 tonnes only at the beginning of March. The only conclusion is that even the unforeseeable additional production in March of some 5 500 tonnes could not have led to exceeding the quota or again that there had been a mistake in planning the production programme at the time mentioned by the applicant which would justify a complaint that the applicant was at fault.

Further there is serious ground for doubt that the surplus production in Casto was not in fact foreseeable and was to be treated as technically quite abnormal. In principle the position is that even if as a rule new plant gives rise at the beginning to lower production it cannot however be ruled out that a normal production level will be achieved immediately especially if such plant, as seems to have been the case in Casto, is immediately run at maximum output for test purposes. Nor can the technical report of the engineer Bolsi produced by the applicant in any way alter the fact that it knowingly accepted such a risk. The report mentions only, without giving further reasons, that the unanimous technical forecast was that the modified plant in Casto could in the first month after commissioning be operated at only 30 to 35% of its capacity. Further it must be assumed, it states, that defects in new plant will normally be revealed in the initial stage. Therefore in the experience of the author the production achieved in March 1981 was technically unforeseeable. Moreover it is relevant in that connection that the production structure according to the said report was at the beginning obviously relatively simple which meant that a high productivity could be expected and made breakdowns relatively unlikely. In

addition, if I understand it correctly, the plant was not modified simply for the purpose of improving quality and reducing waste, but so that it might operate *more quickly.* According to the evidence of the applicant at the hearing, whilst the average daily production at Casto in January 1981 was 409 tonnes and in the last week of February 330 tonnes, it had reached 577 tonnes already in the second week of March and 667 tonnes in the third week of March.

(c) If it is assumed that the production trend at Casto was in fact unforeseeable and the applicant was in no way at fault with regard to the *time* at which the altered plant was commissioned and if it is further assumed that, as was certainly technically possible, it could not be expected that production would be interrupted or slowed down because the plant had to continue running for the discovery and remedy without delay of any defects and because suppliers in particular, who could require complete payment only after acceptance, were entitled to have the necessary tests continue, nevertheless the fact remains in any event, and this at least makes the technical expert inquiry demanded by the applicant superfluous, that some allowance could be made in the production programme in the applicant's two other plants so that the production quotas might be complied with. Such a possibility may certainly be assumed first because the production trend at Casto was already apparent in the second week of March and secondly in view of the scope and trend of production in the applicant's two other plants. As the Court heard, production at Settimo amounted to 8 425 tonnes in February and 12 531 in March, whilst that at Sarrezo was 4 350 tonnes in February and 6 747 tonnes in March. In that respect reference to the *distance* of the works from one another is irrelevant because they are doubtless connected with one another with modern means of communication. The same applies to the reference to agreements with the trade unions on stopping production, which could not be broken without a danger of a strike and which could not be cancelled because the Cassa Integrazione Speciale had not yet come into existence. Those agreements were made as early as January 1981 when a smaller production quota was assumed. However, if there had been no mistake in programming and if in fact the increase in production had to be regarded as completely unforeseeable, that would no doubt have been reasonable ground *vis-à-vis* the trade unions for altering the agreements which had been made.

3. Third submission

In the applicant's view, account ought further to have been taken of the fact, as mentioned in its telex message of 7 April 1981, that subsequently less was produced than allowed by the quotas, and that for 1981, taken as a whole, its quotas had thus not been exhausted in spite of the excess complained of.

The applicant stated at the beginning in that respect that in the second quarter of 1981 output of rolled products was 623 tonnes less than provided for in the quota decision: the corresponding lesser production in the third quarter of 1981 was 8 715 tonnes and in the fourth quarter 7 025 tonnes. The Commission

explained in that respect after the hearing and in answer to a question from the Court that the applicant had produced in the second quarter of 1981 5 277 tonnes of Group II products too much and 11 028 tonnes less than the quota allowed for Group IV. Further, in the remaining quarters of 1981, to which Decision No 1831/81 (Official Journal, L 180, 1. 7. 1981, p. 1) applied, the applicant did not produce the permissible quantities of rolled products but in both cases some 9 000 tonnes less than its quota.

In that respect it is no doubt true that there is nowhere any provision in the general quota decisions to the effect that surplus production may not be offset by a subsequent failure to exhaust the quota fully. However, it is likewise clear that that *in itself* does not provide a reason for requiring such conduct to be taken into account for the purposes of the rules on penalties. There are on the contrary weighty reasons for not doing so.

The system of relating production to reduced demand is clearly based — to some extent in the interests and at the request of producers themselves, who programme their production accordingly — on *quarters.* Article 3 of Decision No 2794/80 expressly states that the Commission is to fix quarterly production quotas for each undertaking. If they have not been exhausted, Article 8 allows them to a certain extent to be carried over to the following quarter. Therefore any excess over the production quotas laid down in Article 9 can relate only to the *quarter.* Certainly the second paragraph of Article 9 cannot, as the applicant thinks, allow any other view, since according to it if any excess of quotas in *previous* quarters is to be taken into account, it is only for the purpose of increasing fines. However, it certainly cannot be inferred from that, as would be astonishing in view of Article 3 and the first paragraph of Article 9, that the whole period for which the general quota decision applies is to be taken into account in determining whether the quotas have been observed.

If it were accepted that exceeding quotas in one quarter might be offset without further ado by a subsequent restriction of production, especially if that were to happen in other than isolated cases, serious disturbances in the system might be expected and as a result attainment of the aim pursued would obviously be jeopardized. Relatively short-term market forecasts are of importance for the system of quotas. They would no longer have any importance, however, and the aim to achieve a price rise by restricting supply would be considerably jeopardized if undertakings could determine the amount of their production according to their own views in the certain knowledge that any surplus production might be offset in subsequent quarters. Since the Commission, which administers the system, would have to expect surpluses and deficiencies in production at any time, it could obviously no longer contemplate reasonable planning and a continued improvement in the existing crisis. Therefore in principle exceeding the quota in any *one* quarter must be punishable even if it is subsequently offset completely by reductions in production.

If however, in circumstances such as the present and in spite of the obvious reservations, it is felt appropriate to recognize something like *mitigating circumstances* by reason of the fact that the market has subsequently been relieved and to contemplate a reduction of the penalties below the normal level, that can certainly only be within narrow limits. Basically it

would be necessary for the compensation in production to take place immediately and after punctual notification so that the Commission might take account of it in the plans which it has to draw up. As far as the present case in concerned, a lesser production in the second half of 1981, that is, a period for which a new system of quotas was established and in respect of which in addition in March 1981 it was not by any means certain whether it would come about at all or in what circumstances, scarcely merits being taken into account. Moreover, for it to be said that a kind of "tätige Reue" [1] has been performed, it would have to be shown that the lesser production in the quarter immediately following was the result of genuine restraint and not the necessary result of trade trends or technical events.

In the present case the first of those conditions is satisfied according to the figures given by the Commission. As regards the second there are however justified doubts with regard to the *extent* of the failure to exhaust the quota in the second quarter of 1981, which far exceeded what would have been necessary to offset the surplus production in the first quarter. It is accordingly tempting to assume that it was due to causes other than decisions of the undertaking, for in view of the restriction of production quotas of which complaints are made on every side, every undertaking will certainly endeavour to exploit them as best it can. It is however perfectly possible that the applicant, at least *at the beginning of the second quarter,* was attempting to keep within its quota and that only later other circumstances led to its straying so far over its production limit. Seen in that light it does not seem unreasonable without further explanation to recognize mitigating circumstances in favour of the applicant and to reduce the fine; I hesitate to mention a particular figure and I feel that the Court will wish to determine it in accordance with its own discretion.

1 — Translator's note: In German law, a voluntary act by an offender intended to forestall the consequences of the offence.

4. Fourth submission

Finally the applicant claims that the decision contains two *mistakes of fact* which cannot be left out of account in appraising it.

It refers to the fifth recital in the preamble thereto, dealing with the applicant's attempt to exculpate itself on the ground that the modified rolling-mill at Casto achieved technically unforeseeable results immediately after commissioning and it is explained that at Casto Group II products were produced whereas the quota was exceeded in Group IV. That is not actually true; on the contrary the mill at Casto could and indeed did produce both groups of products even before it was modified.

Further, complaint is made that in the preamble to the decision there is mention of exceeding the quota only in relation to Group IV. On the contrary, the fact is, the applicant states, that the quota was exceeded also in relation to Group II and that the excess in relation to Group IV was less than stated by the Commission. An expert could easily confirm that on the basis of the regular production reports produced by the applicant.

In my view however those two circumstances cannot lead to a declaration that the contested decision is void or to a modification of the fine imposed.

(a) As regards the first issue to the effect that the Commission set out an incorrect statement of facts in the

preamble to the decision, first of all it has been plausibly explained how the unfortunate wording came about. The applicant's telex message of 7 April 1981 is such as to convey the impression that after the alteration of the plant Group II products were produced for the first time at Casto and that led to an unexpected excess production (moreover the letter from the applicant of 1 February 1982 may be understood to the same effect). Secondly, it is apparent that that finding in the preamble to the decision is of no importance as regards the operative part. In fact the Commission basically did not intend to accept the validity of a justification such as the applicant attempts and did not fail to do so merely by reason of an error of fact. As the following sentence in the preamble to the decision shows, in its view, which is, as we have seen, unexceptionable, in no circumstances can the allegedly unforeseeable excess production at Casto provide justification for exceeding the quota. Thus it is ultimately irrelevant how the production programme at Casto appeared or what impression the Commission had of it.

(b) As regards the type of production resulting in the quota's being exceeded, the Commission has emphasized that the telex reports of the applicant, on which the applicant relied for its view, were defective and that the Commission was therefore justified in having regard in its decision to the reports of its inspectors.

Which of the parties is right on that issue is a question which may in my view remain open for there is no dispute, as I have said already at the beginning, on the total extent to which the quota was exceeded and in actual fact it is irrelevant which groups were concerned. On the one hand it is impossible to accept any justification on the basis of allegedly unforeseeable surplus production. On the other, the applicant's claim that the crisis was less pronounced as regards Group II products and that therefore they were later taken out of the mandatory quota system is likewise no valid justification. That change did not in fact come about, as the applicant assumes, in the second quarter of 1981 but only under the following quota system. As far as penalties under Decision No 2794/80 are concerned, however, the important point is that Group II products were still covered by it and it is hard to see a misuse of powers in the fact that with regard to the penalty imposed for exceeding the quota for the first quarter of 1981 no account was taken of the market situation which did not appear until months later.

5. After all that, it may be said, to sum up, that the applicant has shown no grounds requiring a declaration that the fine imposed on it is void. At most it might be contemplated that the fine, in view of the lesser production established in the second quarter of 1981, should be reduced by such an amount as the Court might see fit to prescribe. If that were to be the outcome of this action I should consider it proper for the parties to bear their own costs.