OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 28 June 1989 *

Mr President,
Members of the Court,

1. By this application Hoogovens contests under Article 33 of the ECSC Treaty individual Commission Decision C (87) 2031 of 10 November 1987 by which Hoogovens was fined ECU 767 850 for exceeding its production and delivery quotas for the second and third quarters of 1985.

Principally, the applicant asks the Court to annul the decision in its entirety or in part; in the alternative, it asks the Court to make an appropriate reduction in the fine.

2. The ECSC provisions governing the production quotas for a number of products of the steel industry is very familiar ground for the Court, which has had to interpret them on many occasions. [1]

Consequently, I can confine myself to pointing out that the contested individual decision is based on general Commission Decision No 234/84/ECSC of 31 January 1984 (Official Journal L 29, 1.2.1984, p. 1). It is noted in particular that the first paragraph of Article 12 of that decision provides as follows: 'A fine, generally of ECU 100 for each tonne in excess, shall be imposed on any undertaking exceeding its production quotas or that part of such quotas which may be delivered in the common market'.

3. Let us now turn to the facts. It is not contested that Hoogovens exceeded its quotas to the extent alleged. The applicant itself admits it and raises a number of arguments in order to justify its having exceeded the quotas.

4. For a more detailed account of the arguments of the parties I would refer to the Report for the Hearing.

5. The applicant maintains essentially that the decision imposing the fine is not properly reasoned. The alleged deficiency in the statement of reasons does not relate to the finding that there has been an infringement but solely to the determination of the amount of the fine. In particular, Hoogovens claims that:

(1) the Commission does not indicate in the decision either the circumstances or the criteria which it took into account in order to determine the amount of the fine;

(2) the Commission did not reveal those criteria so as not to show up the hidden flaw in the decision itself, that is to say

* Original language: Italian.

1 — See, in particular, the judgments of 10 December 1986 in Case 41/85 *Sideradria* v *Commission* [1986] ECR 3917, and of 24 September 1987 in Case 340/85 *Porto Nogaro* v *Commission* [1987] ECR 3575.

the existence of discrimination in exercising its power to impose sanctions, which is apparent from a comparison between the amount of the fine imposed on Hoogovens and the amount of the fines imposed on other steel undertakings on the same day.

6. Let us consider the first limb of the argument. Is the decision in fact vitiated by an inadequate statement of reasons?

7. On a general level, it seems clear to me that the requirements of the statement of reasons of a decision imposing a fine and those of a decision holding that there has been an infringement are different. In order validly to find that there has been an infringement there must be, on the one hand, a set of findings of fact and of law which, on the other hand, must be supported by a logical chain of reasoning, clearly identifying the criteria employed. Very clearly, the purpose of this is to enable the interested party to assess the correctness of the statements made and to enable the Court to review the acts of the authority which issued the contested measure and, if need be, criticize it.

The standard of such a statement of reasons seems to me to be much higher than the standard required of the reasons for setting a fine imposed at a particular level.

As a general rule, there is in fact a sanction laid down within the limit of which (and, in some cases, even beyond which) the competent authority can choose the quantum of the penalty to be imposed in the particular case in the light of certain criteria which are peculiar to that penalty and which, provided obviously that they can be recognized by the undertakings and the Court, are hard for the Court to review (except in the case of manifest or proven discrimination).

Now, as my predecessor Mr Advocate General Reischl stated in his Opinion in *Lucchini* v *Commission* (judgment of 19 October 1983 in Case 179/82 [1983] ECR 3083), the discretion which the Commission has in fixing the amount of the fine where production and delivery quotas have been exceeded ensues from Article 58(4) of the ECSC Treaty in conjunction with Article 9 of the relevant general decision (then Decision No 2794/80, in this case Article 12 of Decision No 234/84/ECSC, which has superseded it). From the observations of my learned predecessor, and from the position adopted by the Court in particular in paragraphs 7 and 8 of the judgment in *Lucchini*, the legislative framework is clear. More specifically, the Commission has placed a self-imposed limit on the powers conferred on it by Article 58(4) of the ECSC Treaty by deciding that in all cases where quotas are exceeded it will impose a fine of, in general, ECU 100 for each tonne in excess, save in exceptional cases warranting the application of a different rate. The Court made it clear that: 'The Commission was validly entitled to exercise its discretion by fixing such a rule which meets the requirements of equality whilst leaving the possibility open to take account of exceptional situations'. 'As a result the view must be taken that no *specific statement of reasons* (my emphasis) in relation to the rate of the fine is necessary save in exceptional cases in which the Commission applies a rate other than the normal rate.'

The rationale of this requirement is clear from the Court's words and, in particular, from the reference to the requirements of equality. In other words, when the Commission diverges from the 'standard rate' which in itself guarantees that equality, it must provide a more precise statement of reasons in view of that requirement (a 'specific statement of reasons').

8. This brings me to my first conclusion: it is not necessary to have a specific statement of reasons when the Commission, taking the view that the seriousness of the infringement corresponds to the general rule because there are no circumstances justifying a departure from the 'standard rate', applies that rate. This confirms my earlier observation, that is to say that the statement of the reasons for imposing a particular level of fine in a particular case is subject, by reason of its nature, to less strict requirements than the statement of reasons relating to the infringement.

9. At the same time, that conclusion prompts me to give my views on two further aspects. In the first place, does the requirement for a specific statement of reasons apply in the abstract also where a rate lower than the 'standard rate' is chosen? Secondly, if so, has the Commission satisfied that requirement in this case?

10. As far as the first aspect is concerned, I do not think that it can be seriously argued that the application in itself of a rate lower than the 'standard rate' releases the Commission from having to give any reasons whatsoever. Rather, it is true that the situation is different from where the rate applied is higher that the 'standard rate', in particular in the case referred to in the second paragraph of Article 12 of general Decision No 234/84/ECSC. It appears obvious in this context that the Commission must provide an even more exhaustive statement of the reasons which led it to impose a higher fine. But it appears evident to me that a specific statement of reasons — albeit a brief one — is necessary also in the case with which we are concerned here of a lower fine, even if only to obviate possible complaints of different treatment and, in the final analysis, of discrimination. This approach seems to me to the only one which can square with the *ratio decidendi* of the aforementioned judgment in *Lucchini.*

I repeat therefore that in such a case the undertaking on which the fine is imposed is entitled to know, in summary form, the reasons why it qualifies for a reduction in the fine. It seems to me out of the question that the Commission should have to do anything other than indicate the reasons for the reduction in a sufficiently comprehensible way. Whilst it is true that a specific statement of reasons is not necessary for the straightforward imposition of the 'standard rate', it is inconceivable that the application of a more favourable rate to the undertaking should be subject to a duty to provide a statement of reasons going beyond the requirements of comprehensibility and clarity for the undertaking and for the Court.

11. To turn now to the second aspect, that is to say whether in this case Hoogovens could ascertain the reasons why it was granted a reduction in the fine with respect to the fine which would normally have been applied to it, the Commission maintains that the answer to this question is contained in the penultimate indent of the last recital in the preamble to the contested decision: 'In view of the details which emerged during the investigation carried out in the course of the infringement procedure, a fine of

ECU 50 for each tonne in excess should be imposed'.

However, showing great candour, the Commission itself acknowledged at the hearing that this reason was perhaps too succinct. I agree.

12. I do not consider that the sentence referred to by the Commission satisfies, to the extent necessary in this case, the requirements — albeit reduced to minimum — to which the statement of reasons is subject. It does not seem to me that a mere reference to the details which emerged in the investigation carried out during the infringement procedure enables Hoogovens — even less the Court — to understand sufficiently clearly the reasons for the reduction in the fine and, in addition, enables legitimate doubts as to the existence of discrimination to be dispelled.

13. In this connection I should like to make myself extremely clear. The fact that the Commission imposes a number of fines on a number of steel undertakings, even if it does so concurrently, does not give rise to an obligation on the Commission itself to make express comparisons in the various decisions between attenuating circumstances justifying reductions in the fines in the various cases. In that respect, I fully concur with the Commission's statement in the rejoinder. I would add that Article 58(4) of the ECSC Treaty gave the Commission the specific task of imposing fines where undertakings do not comply with decisions taken under that article. It was not instructed to write a manual describing the way in which it performs that task. In this connection, I disagree with the statement in the application which goes as far as to claim that the Commission's policy on the imposition of files emerges from the preambles of the individual decisions. It is my belief that, provided that in making sure that the legislation which it adopts is complied with it does not apply it incorrectly — in particular by failing to fulfil the duty to state reasons or to comply with the principle of equality — it does not have to give detailed information in each implementing decision of the reasons for which it did not apply the 'standard rate' to other undertakings.

14. On this basis I do not consider that in this case the decision at issue provided a sufficient statement of reasons as regards the criteria followed by the Commission — quite apart from any reference to fines imposed on competing undertakings by other decisions. As justification it is sufficient to point out that a statement of the type 'in view of the details which emerged during the investigation carried out in the course of the infringement procedure' is, on the one hand, a truism (it is to be hoped that the Commission did base itself on the results of inquiries carried out and not on hearsay or presumptions or, worse still, on findings made in an anti-dumping or competition investigation) and, on the other, so general as not to afford any assistance in understanding the real reasons for the reduction in the fine.

15. Admittedly, the Commission argues that the decision contains details from which Hoogovens could conclude, simply by excluding two circumstances which it

expressly claimed to be attenuating circumstances but which the Commission explicitly rejected, that the reason for the reduction in the fine was connected with the applicant's third argument, to wit the ratio between the production quotas and the part of such quotas which might be delivered in the common market (I/P ratio) (see in particular, the second indent of the third recital).

16. As can be seen, it cannot be concluded from the second indent of the third recital in the preamble to Decision C (87) 2031 that the circumstance underlying the reduction in the fine from ECU 100 to 50 was the I/P ratio. Quite the contrary. The wording chosen by the Commission suggests that Hoogovens' difficulties as a result of the unfavourable I/P ratio resulted in the adoption of Decision No 1433/87/ECSC of 20 May 1987. In other words, far from being considered as an attenuating circumstance for the purposes of the contested decision, the unfavourable I/P ratio is pointed to in the second indent of the third recital as having been taken into account for the purposes of another, different decision, with which these proceedings are not concerned.

The third recital reads as follows:

'Whereas, however:

Hoogovens' intention to purchase quotas and its inability to do so does not warrant its disregarding its obligations under the quota system; it should have planned its deliveries in the light of the quotas available;

Perusal of the latter decision definitely confirms this: it enabled Community undertakings with unfavourable I/P ratios to increase the proportion of the quota to be delivered in the common market by converting part of their production quotas.

the difficulties which Hoogovens had been experiencing for a long time as a result of the unfavourable ratio in its case between the part of the quota which may be delivered in the common market and the total production quota were effectually recognized by the Commission and led it to adopt Decision No 1433/87/ECSC of 20 May 1987;

Therefore it is quite clear from the contested decision (second indent of the third recital) and in the light of Decision No 1433/87/ECSC that the unfavourable I/P ratio was rejected and not accepted as a relevant circumstance for reducing the fine. Consequently, the Commission's arguments seem more of an attempt to fill a gap (which moreover it recognizes to exist) in the statement of reasons in some way after the event than a reasonable interpretation of the contested decision.

the quota system applies on a quarterly basis as a result of which one quarter cannot be set off against another.'

It seems to me therefore that Hoogovens is right to maintain that it cannot be concluded from a reading of the contested decision that the reason for reduction in the fine was the unfavourable I/P ratio. It is certain that the Court cannot reach such a conclusion therefrom. This eliminates radically and definitively any doubt as to the existence of a flaw in the statement of reasons.

17. To conclude, I consider that the contested decision is vitiated by a defective statement of reasons. It remains to be considered what consequences should flow from this finding. On the one hand, the applicant itself does not contest the existence of the infringement and admits that it exceeded the quotas as alleged: I therefore do not consider that it would be appropriate to cancel the fine altogether. On the other hand, the Commission failed in its duties by not specifying sufficiently the criteria which it used as its basis for the reduction in the fine. In these circumstances, I suggest that the Court should apply the second paragraph of Article 36 of the ECSC Treaty and reduce the fine imposed on Hoogovens by an appropriate amount.

Clearly, the Commission should be ordered to pay the costs.