In Case 235/82

FERRIERE SAN CARLO SpA, an undertaking having its registered office at 1 Via Nazionale, Caino in the Province of Brescia, represented by its Managing Director, Faustino Busseni, a surveyor, and advised by Fabrizio Massoni, its Legal Adviser, 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, 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 Article 9 of Commission Decision No 2794/80/ECSC of 31 October 1980, imposed a fine of 165 570 European Currency Units on the applicant for exceeding by 2 007 tonnes the production quota allocated to it for the fourth quarter of 1980 in respect of products falling within Category IV (light sections),

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 European iron and steel industry was facing, in the words of Article 58 of the ECSC Treaty, a period of manifest crisis, and since the means of indirect action at its disposal had proved ineffective or insufficient to deal with the crisis it considered that it was necessary for it 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, 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 iron and steel industry.

Article 3 of the decision provides that the Commission is to fix quarterly production quotas for each undertaking on the basis of reference production figures and by application of abatement rates to those figures.

Article 7 (1) of the decision provides that, subject to transitional corrections, undertakings must comply with the production quotas notified to them by the Commission. Article 7 (2) states that "with regard to the delivery of products subject to the quota system, undertakings may not exceed, by group of products, for deliveries within the common market, the ratio of Community deliveries to total deliveries in those 12 months of the period from July 1977 to June 1980 in which the total production of the four groups of rolled products was the highest".

Article 9 provides:

"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 . . . This amount shall be increased by 1% for each month of delay of payment, from the date fixed in the penalization decision."

Articles 10 to 13 require undertakings to report to the Commission each month from October 1980 onwards their production, by plant, of crude steel and

rolled products as well as the subdivision of their deliveries between deliveries in the Common Market and exports to non-member countries.

Finally, Article 14 enables the Commission to adjust the provisions of the decision "where the production or delivery restrictions imposed by [the] decision or its implementing measures entail exceptional difficulties for an undertaking", provided that appropriate supporting documentation is submitted to the Commission.

(b) The position of Ferriere San Carlo SpA during the fourth quarter of 1980

The Commission fixed a production quota for the applicant for the fourth quarter of 1980 of 5 792 tonnes of steel in respect of products falling within Category IV.

It is agreed that the applicant exceeded the production quota allocated to it by 2 007 tonnes.

Consequently, by decision of 13 August 1982, the Commission imposed a fine of 165 570 ECU on Ferriere San Carlo after the undertaking had been given an opportunity to submit its comments as provided for by the first paragraph of Article 36 of the ECSC Treaty.

B — Written procedure

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

The written proceedings 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 ask the parties to answer the following questions before the oral procedure:

"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 its communications with Ferriere San Carlo SpA laying down 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 undertaking's steel production during the period in question of which the Commission is aware.

(b) The existence of an infringement

3. The Commission claims (rejoinder, page 3, paragraph 3) to have notified iron and steel undertakings even before 7 October 1980 that it was preparing to introduce a system of steel production quotas with effect from 1 October 1980. It is requested to produce all the relevant information and documents in that respect.

4. Does the Commission accept that the production quota allocated to the undertaking for the fourth quarter of 1980 had been exhausted and even exceeded by the date on which Decision No 2794/80/ECSC (published in the Official Journal of the European Communities on 31 October 1980) came into force and that consequently the

undertaking termporarily ceased to operate in November and December 1980 in order that it should not exceed the quota even more?

(c) The application of adjustments provided for in Decision No 2794/80/ECSC of 31 October 1980

5. The Commission is requested to reply to the applicant's claim (fifth paragraph on page 2 of the application, repeated on page 5 of the reply) that the quotas allocated to it were not adjusted despite an increase in its production potential, and in particular to state whether it received a request from the applicant under Article 4 (4) of Decision No 2794/80/ECSC (adjustment of the reference production following an investment programme duly reported)?

6. Was a request made to the Commission by the undertaking for application of the provisions of Article 14 of Decision No 2794/80/ECSC (adjustment of the provisions of the decision where undertakings are faced with exceptional difficulties)?

(d) The method of calculating the fine

7. Article 9 of Decision No 2794/80/ECSC provides that the fine is generally to be 75 ECU per excess tonne for ordinary steels. Is it the practice of the Commission to vary the amount of the fine according to the 'contributive capacity' of an undertaking and in particular in view of the exceptional difficulties which it may encounter?

8. 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 the product?

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

Can the Commission comment fully on the undertaking's claim that the fine should be reduced from 165 570 ECU to 56 775 ECU?

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 fourth quarter of 1980, subdividing them, if possible, in respect of that period by sector (production, processing, etc.), and to produce all supporting documentary evidence.

2. The undertaking is requested to specify in respect of each month of 1980 the tonnage produced by it of products falling within Category IV referred to in Article 2 of Decision No 2794/80/ECSC.

(b) The existence of an infringement

3. The undertaking is requested to produce all supporting documentary evidence concerning its contention that the production quota allocated to it for the fourth quarter of 1980 was exhausted and even exceeded at the date on which Decision No 2794/80/ECSC (published in the Official Journal of the European Communities on 31 October 1980) came

into force and that consequently it ceased to operate during the months of November and December 1980 in order that it should not exceed the quota even more.

(c) The application of adjustments provided for in Decision No 2794/80/ECSC

4. The undertaking is requested to give detailed information concerning the extent to which it altered its production potential and to state whether the Commission was informed thereof in the circumstances laid down in Decision No 2794/80/ECSC (Article 4 (4))?

5. Did the undertaking submit a request to the Commission for the application of the provisions of Article 14 of Decision No 2794/80/ECSC (adjustment in the event of exceptional difficulties)?

(d) The method of calculating the fine

6. The undertaking is requested to produce all the relevant information necessary in order to calculate the value added (per tonne) to the rolled products by its processing operations during the fourth quarter of 1980.

7. The undertaking is requested to produce all relevant information which would justify, in a detailed manner, its claim that payment of the fine would have serious consequences for it such as suspension of payments, filing of accounts, etc."

By order of 9 March 1983 the Court decided to assign 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 the decision of 13 August 1982 unfounded and accordingly void;

(b) In the alternative:

If the Court takes the view that the applicant's conduct should be penalized, reduce the fine imposed on it to an amount which takes into account the explanations and arguments put forward by it;

(c) Make an appropriate order as to costs;

(d) In its reply the applicant also claimed that it should be granted "terms and payment periods" which take account of both its financial position and the current situation in the iron and steel industry.

The Commission contends that the Court should:

(a) Dismiss the action as unfounded;

(b) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

Ferriere San Carlo SpA contests both the fine in principle and the amount of the fine.

A — The fine in principle

1. The submission that the contested decision is illegal because it does not take into account the fact that the alleged surpassing of its quota by the

applicant was due exclusively to its exportation of 2 000 tonnes of steel to a non-member country (Libya):

(a) Ferriere San Carlo contends that its alleged surpassing of its quota was due exclusively to its exportation of two consignments of 1 000 tonnes each to Libya on 10 November and 4 December 1980.

It takes the view that it cannot be alleged that it exceeded its quota by delivering two orders outside the Community, when the excess tonnage corresponds exactly to the tonnage to which the two orders relate.

The applicant contends that if, as the Commission maintains, the ECSC Treaty does not require the Commission to exempt from the quota system products intended for export, equally it does not require the Commission to penalize an undertaking which has exported outside the EEC, all the more so when the applicant has complied with the spirit of the Treaty as expressed in Articles 3 and 4 and has, moreover, caused no injury to its competitors established in the Member States.

(b) The Commission point out, first, that the notion of delivery is entirely separate from that of production.

In the Commission's opinion any restriction of production has an impact both on opportunities of selling on the Community market and on export opportunities.

For that reason the ECSC Treaty does not require the Commission to exempt from the quota system products intended for export.

As the Court held in its judgment of 7 July 1982 in Case 119/81 *(Klöckner-Werke AG)*, the extent to which external trade must be taken into consideration is for the Commission alone to decide and in that connection it must take account of both the Community steel industry's own needs and the Community's interests in its relations with non-member countries.

Secondly, the Commission points out that it has never stated specifically that the excess production was solely due to the exports to Libya. It states that its staff merely determined that the applicant had exceeded the quota allocated to it in respect of the fourth quarter of 1980, and that the fact that the applicant sought to justify its surpassing the quota by reference to exports of an identical amount to Libya cannot affect the correctness of the contested decision.

2. The submission that the retroactive effect of Commission Decision No 2794/80/ECSC, on the basis of which the decision of 13 August 1982 was taken, is unlawful:

(a) Ferriere San Carlo maintains that the retroactive effect of the contested decision is unlawful for two reasons:

(i) The first consignment of 1 000 tonnes was despatched to Libya on 10 November 1980 and was in respect of an order made on 7 October 1980, that is to say before Decision No 2794/80, which was published in the Official Journal on 31 October 1980, came into force.

(ii) It was wrong to take account of production in the last three months

of 1980 in order to determine any excess because normally production in October and orders accepted before 31 October should not be taken into account. Consequently the Commission should, at the very least, withdraw its objections in respect of half the alleged excess production.

(b) In its defence the Commission maintains that Decision No 2794/80 applied even to contracts which were in the process of being performed and that the applicant's two deliveries to Libya could not avoid that rule.

In its rejoinder the Commission contends that because of the deterioration in the steel market it was necessary to put the quota system into effect as quickly as possible and to prevent some undertakings taking advantage of an abnormal increase in their production in October 1980.

It states that it informed undertakings of that need before 7 October 1980, the date on which it placed its proposals before the Council.

In any case the Commission states that undertakings were informed officially, either by means of Decision No 2613/80/ECSC of 10 October 1980 or by means of the Commission's communication of 11 October 1980 to undertakings operating in the Community steel industry, that it was preparing to introduce under Article 58 of the Treaty a quarterly production quota system applicable to every steel undertaking and that the quotas would include the fourth quarter of 1980.

The Commission adds that the retroactive effect of Decision No 2794/80 cannot be regarded as unlawful, because it was necessary for practical reasons to fix quarterly quotas from 1 October 1980 in order to enable undertakings the better to adapt their production programmes since it is the custom in the steel industry to fix production according to quarterly programmes and to draw up accounts at the end of the calendar year.

In order to alleviate the difficulties which the decision might cause undertakings, moreover, Article 14 thereof enables the Commission to adjust its provisions where an undertaking experiences exceptional difficulties.

The applicant did not make use of that possibility and its failure to do so, which is in no way attributable to the Commission staff, cannot reduce its liability.

3. The submission that the contested decision infringed Articles 3, 4 and 33 of the ECSC Treaty and Article 14 of Decision No 2794/80:

(a) Ferriere San Carlo is of the opinion that it caused no injury to competing undertakings established in the EEC because it delivered the excess production outside the European Economic Community.

By failing to take that fact into account the decision imposing a fine on it disregarded the aforementioned provisions. The applicant maintains that in view of the wording of Articles 3 and 4 of the ECSC Treaty it should not have been

penalized, but on the contrary should have been congratulated for having faithfully applied the principles pursued by the Commission and confirmed by the Court.

In its opinion, penalizing it for having delivered 2 000 tonnes of its products outside the EEC will have one of the two following consequences:

Either the profit from supplying the goods will be reduced to nothing by the imposition of a fine from which uneconomic undertakings will benefit because they receive subsidies;

Or a non-member country will benefit from the prohibition against supplying the goods.

In both cases the applicant considers itself to be a victim of discrimination contrary to the letter and spirit of Articles 3 and 4 of the Treaty.

(b) The Commission first expresses the view that the submission is merely a general repetition of the first submission, examined above, because it is based primarily on the alleged lawfulness of exporting the excess production to non-member countries. The Commission therefore refers the Court to its reply to that submission.

Secondly, with regard to the alleged infringement of Articles 3 and 4 of the ECSC Treaty it states that those articles form part of the general description of the purposes of the Community and define more than ten different objectives. It is impossible to pursue all those objectives at the same time and therefore it is necessary to make a choice between them, particularly at a time of crisis justifying the adoption of exceptional measures.

The Court has consistently held that in making that choice and combining the various objectives as necessary the Commission enjoys a wide discretionary power to decide what the order of priority among the objectives of the Treaty should be and to select those which it regards as the most important.

In this case the quota system clearly gives priority to the attainment of fundamental objectives by enabling production to be adjusted to demand and by seeking to avoid the even greater economic and social difficulties which might arise from an imbalance between supply of and demand for the products in question.

Thirdly, with regard to the alleged infringement of Article 33 of the ECSC Treaty and Article 14 of Decision No 2794/80 the Commission takes the view that the limbs of that submission are too vaguely worded for it to be able to reply in a useful manner.

Fourthly, the Commission disputes the applicant's allegation that it has suffered discrimination and states that the amount of the fines is not passed on to uneconomic undertakings and that it is not true to say that non-member countries benefit from the prohibition against the supply of goods since there is no such prohibition.

The defendant maintains that in fact discrimination would only exist if the Commission did not extend the quota system to undertakings' deliveries outside the common market because such undertakings would then have an unfair advantage over those which limited their operations to the Community.

4. The submission that the contested decision wrongly charges the applicant with failing to make the reports provided for by Articles 10 and 14 of Decision No 2794/80:

(a) Ferriere San Carlo contends that it is a small family concern and that because it was not familiar with the very numerous rules laid down by ECSC directives it had omitted in all good faith to make the reports required by Article 10 *et seq.* of Decision No 2794/80 because it believed that products exported to non-member countries did not fall within the quotas.

(b) The Commission is of the opinion that the submission is untenable both in law and in fact.

It is untenable in law because ignorance of the law is no excuse especially since ample publicity was given to the introduction of the quota system for steel. It is unfounded in fact because the undertaking had no difficulty in contacting the staff of the Commission in order to obtain the necessary information.

5. The submission that the contested decision is illegal because it did not take account of the applicant's conduct after 31 October 1980.

(a) Ferriere San Carlo states that it suspended production temporarily during November and December 1980 in order not to exceed the production quotas which had been imposed on it.

It considers that step to be further evidence of its good faith and of its concern, once it had fulfilled the orders it had received from non-member countries, not to exceed the quotas allocated to it.

(b) The Commission replies that the quota system which has been put into effect is a system of quarterly quotas which permits part of the quota to be carried forward to a subsequent period, but does not allow the contrary.

Consequently any reduction in production effected by the undertaking in the course of the following quarter has no effect on the legality of the decision to impose a fine.

6. The submission that the quotas allocated to the applicant were not adjusted although its production potential had increased:

(a) Ferriere San Carlo states that it activated a new rolling-mill after notifying the Commission and after having been inspected three times in that respect.

The new mill increased and rationalized its production considerably. The applicant therefore considers that it satisfied the conditions laid down by Article 14 of Decision No 2794/80, Articles 13 and 14 of Commission Decision No 1831/81/ECSC of 24 June 1981 and Articles 14 and 15 of Commission Decision No 1696/82/ECSC of 30 June 1982.

(b) The Commission did not reply to the submission.

7. The submission that the Commission wrongly charges that the applicant exceeded its quota for the third quarter of 1981 by 142 tonnes:

(a) Ferriere San Carlo acknowledges the excess production which resulted from the increase in its production potential in comparison to the quotas allocated to it on the basis of its old production potential.

In its final submissions the applicant states that the question of the excess with which it is charged seems to have been settled by the grant of new allocations and that it is therefore content to rely on the wisdom of the Court on this point.

(b) The Commission is of the opinion that no account can be taken of the submission since it relates to events which are unconnected with the contested decision and which cannot be raised in these proceedings.

B — The amount of the fine

1. The effects of the contested fine

(a) Ferriere San Carlo maintains that the enforcement of the fine imposed on it would force it to close its workshops and to lay off its 30 employees.

It adds that in view of its small capital resources and the level of its indebtedness payment of the contested fine would result in its bankruptcy.

(b) The Commission observes that even if the applicant's alleged difficulties are real, the economic position of the undertaking could not prevent the Commission from imposing a fine to enforce its decision, having regard to the serious condition of the Community steel market.

2. The method of calculating the fine

(a) Ferriere San Carlo draws the Court's attention to the size of the fine which was imposed on it and which was based on a figure of 82.5 ECU per excess tonne.

It points out that according to Article 58 of the Treaty the maximum amount of the fine is the value of the excess production.

Consequently, if the Court considers that the fine was justified in principle, it should be re-calculated on the following basis:

Excess tonnage limited to 1 000 tonnes;

Amount of the fine limited to the profit made on the 1 000 excess tonnes, that is to say 56 775 ECU, as opposed to the 165 570 ECU represented by the fine actually imposed;

Interest at the rate of 1% per month since 25 October 1982.

(b) The Commission considers that by playing upon the words "value of the tonnages produced in disregard" of its decision the applicant is attempting to have the fine reduced by maintaining that the profit from the products exported to Libya was less than 82.5 ECU per tonne, the figure adopted as the basic amount of the fine.

On that specific point the Commission restricts itself to stating that the information contained in the file at present is not sufficient to enable it to know how much profit the undertaking actually made on the transaction in question.

In any case it maintains that that is not the real issue. For the Commission the fact that the undertaking is seeking to justify exceeding its quota by reference to exports of an equal amount to Libya does not mean that the amount of the fine must take the value of that transaction into account in calculating

the value of the excess production in accordance with Article 58 of the Treaty.

The Commission considers that its sole duty in this respect is to penalize the excess production.

Finally, the Commission emphasizes that for the purposes of Article 58 of the Treaty the expression "value of the tonnages produced in disregard" of its decisions means the market value, that is to say the selling price of the products, and not the amount of the profit as is suggested by the applicant.

Consequently, the Commission maintains that Article 58 of the Treaty would only have been misapplied if the amount of the fine had been greater than the selling price, which was not the case here.

C — The request for time to pay

1. Ferriere San Carlo maintains that if the Court considers that it must uphold the fine imposed on the applicant it should lay down "reasonable terms and payment periods" such as had been granted in the past, that is to say:

15 years at a rate of interest corresponding to the customs and laws of the Benelux countries and to the rate provided for in the decision of 13 August 1982.

2. The Commission disputes that it has ever in the past accepted payment over such a period at a rate of interest calculated in that manner.

It states that at present time for payment is allowed on the basis of a Commission decision of 5 April 1977 which provides for a maximum period of 12 months subject to payment of interest at bank rates.

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

A — The Commission's replies

Questions (a) 1 and 2: The Commission produced the communications and declarations requested.

Question (b) 3: The Commission produced copies of the minutes of two meetings it held with independent Italian producers on 4 and 17 October 1980 in order to inform them of the introduction of a quota system for steel production.

Question (b) 4: The Commission maintains that the undertaking had not exhausted or exceeded its production quota by the date on which Decision No 2794/80 came into force, that is to say 31 October 1980. The undertaking's production for the last quarter of 1980 was in fact as follows: October: 3 166 tonnes; November: 2 194 tonnes; December: 2 439 tonnes, making a total of 7 798 tonnes. Since the quota allocated to it for that quarter and communicated to it on 1 November 1980 was 5 733 tonnes, it is clear that not only was production continued in November and December but the quota was not exceeded until December.

Question (c) 5: The Commission states that when an inspection of the premises of Ferriere San Carlo was made on 5 February 1981 no change in the facilities was noted. By letter dated 2 June 1981 the undertaking informed the Commission in a very general manner that it had carried out the improvement to its plant and that it therefore requested an adjustment to its quota under Article 4 (4) of Decision No 2794/80.

The request was repeated and further details were given in a telex message of 22 July 1981, in which the undertaking informed the Commission of *its intention to proceed* with the modification of its plant *during August 1981.*

The Commission therefore replied by letter of 7 August 1981 requesting further information so that Article 13 of Decision No 1831/81/ECSC could be applied, since the modification amounted to new investment which was to come into operation after July 1981.

By letter of 22 September 1981 Ferriere San Carlo stated that the modifications were the first step in a modernization plan which was to be completed in December 1981.

A further inspection was therefore carried out on 21 October 1981 which established that the alteration was not a new rolling-mill, or work which would at least double the preceding production capacity, and there was therefore no possibility of granting a supplementary quota under Article 13 of Decision No 1831/81.

For those reasons a decision rejecting its request was sent to the undertaking on 27 January 1982.

On 24 September 1982 Ferriere San Carlo informed the Commission that the operations to replace the old plant had been more extensive than expected and that they had continued until April 1982.

The Commission therefore carried out a fresh inspection on 26 October 1982, in the course of which it was established that the alterations had been carried out between August 1981 and February 1982 and that as a result of the work production capacity had been more than doubled.

Consequently, the production quota was adjusted under Article 13 of Decision No 1831/81 *as from the fourth quarter of 1981* and the undertaking was informed of that decision on 22 November 1982.

Question (c) 6: The Commission states that the undertaking never requested the Commission for application of the provisions of Article 14 of Decision No 2794/80/ECSC.

Question (d) 7 and the first and second paragraph of Question (d) 8: The Commission submitted replies which were identical to those which it gave in Case 234/82 *(Ferriere di Roè Volciano)* to Question (d) 6 and the first and second paragraphs of Question (d) 7 in that case.

Question (d) 8, third paragraph: The Commission considers that the criterion of the value added or the profit made is impracticable and that that is shown precisely by the case of Ferriere San Carlo.

In its opinion the applicant's figure of LIT 75 000 per tonne is derived from its submission regarding the *Ferriere di Roè Volciano* case.

In fact the figure was justified in that case on the ground that Ferriere di Roè Volciano only processed on behalf of others.

Since that is not the case with Ferriere San Carlo, the Commission considers that the figure suggested by the latter for the fine to be imposed on it has no financial basis whatsoever.

B — Ferriere San Carlo's replies

The company has not effectively replied to the seven questions put to it by the Court.

It produced first a list of documents, with no explanatory comments, which was lodged at the Court Registry on 19 April 1983 (13 documents consisting principally of summaries of daily production records, telex messages, bills, letters from the Commission and a report of an inspection of its accounts conducted by auditors).

Subsequently it lodged a document at the Court Registry on 25 April 1983 which specifies to which of the questions asked by the Court each of the documents previously sent to the Court relates.

V — Oral procedure

At the sitting on 21 September 1983 oral argument was presented by the applicant, represented by Fabrizio Massoni, *avocat*, and by the Commission of the European Communities, represented by Sergio Fabro, acting as Agent.

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

Decision

1 By application lodged at the Court Registry on 17 September 1982 Ferriere San Carlo 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 Commission Decision No 2794/80/ECSC of 31 October 1980 establishing a system of steel production quotas for undertakings in the iron and steel industry (Official Journal, L 291, p. 1).

2 The contested decision states that in breach of the aforementioned decision No 2794/80 the applicant exceeded by 2 007 tonnes the production quota of 5 792 tonnes which the Commission had allocated to it for the fourth quarter of 1980 in respect of products falling within Category IV. It declares that the applicant's production therefore exceeded the quota allocated to it by more than 10% and, pursuant to the first and second paragraphs of Article 9 of the said decision, it imposes on the undertaking a fine of 2 007 × 82.5 ECU, that is to say a total of 165 570 ECU.

3 By this action the applicant seeks primarily to have the contested decision fixing the fine declared void or in the alternative to have the fine reduced, and finally requests the Court to grant "terms and payment periods" which take account of both its financial position and the current situation of the iron and steel industry.

The claim that the contested decision should be declared void

4 In support of its claim that the decision should be declared void the applicant relies on the following submissions: the contested decision took no account of the fact that the quota in question was exceeded solely because of an order exported to a non-member country; the general decision on which the contested decision is based, Decision No 2794/80, has unlawful retroactive effect; the contested decision infringes Articles 3 and 4 of the ECSC Treaty; it also infringes Article 14 of Decision No 2794/80 and Article 33 of the ECSC Treaty; the quota allocated to the applicant was not adjusted despite the fact that its production potential had increased; the contested decision took no account of the applicant's conduct after 31 October 1980.

The first submission in the application

5 The applicant contends that its alleged surpassing of its quota was due exclusively to the exportation of two consignments of 1 000 tonnes each to Libya on 10 November and 4 December 1980. It argues therefore that the Commission should not penalize an undertaking for exporting to a non-member country, particularly when in doing so the applicant has complied with the spirit of the Treaty as expressed in Articles 3 and 4 and has, moreover, caused no injury to its competitors established in the Member States.

6 As the Court has already emphasized in other judgments the extent to which external trade is to be taken into consideration in relation to measures adopted under Article 58 of the ECSC Treaty is a matter for the Commission to decide, and in arriving at that decision it must take account of the Community steel industry's own needs and the Community's interests in its relations with non-member countries. Therefore it is not possible to infer from Article 58 any obligation on the Commission to exempt from the

quota system the production which certain undertakings might prefer to direct towards export markets. The submission must therefore be rejected.

7 Furthermore, as the Commission rightly stated the penalty for exceeding the quota was imposed not in respect of the exports to a non-member country but in respect of the total production during the quarter in question. Moreover, it is clear from the evidence that in December 1980 alone, that is to say after the order intended for export to a non-member country had been completed, the applicant manufactured 2 439 tonnes of steel products, which is greater than the excess production with which it is charged.

The second submission in the application

8 The applicant maintains that the retroactive effect of the contested decision is unlawful for two reasons: in the first place, the first order of 1 000 tonnes, despatched to a non-member country on 10 November 1980, was in respect of a contract made on 7 October 1980, that is to say before Decision No 2794/80, which was published in the Official Journal on 31 October 1980, came into force; in the second place, it was wrong to rely on production in the last three months of 1980 in order to determine any excess because production in October and orders accepted before 31 October are not normally to be taken into account. Consequently, the applicant maintains that the Commission should, at the very least, withdraw its objections in respect of half of the alleged excess production.

9 The reply to be given to that submission, as the Court has held on a number of occasions (judgment of 16. 2. 1982 in Case 258/80 *SpA Metallurgica Rumi* v *Commission* [1982] ECR 487; judgment of 16. 2. 1982 in Case 276/80 *Ferriera Padana SpA* v *Commission* [1982] ECR 517), is that Decision No 2794/80/ECSC did not have genuine retroactive effect since the undertakings were able to adjust their production in November and December to take account of their quotas for the quarter and thereby avoid any infringement. Moreover, although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.

10 In the circumstances of this case it was necessary to include the month of October in the system in order to prevent undertakings from increasing their production in October in anticipation of the reductions subsequently to be applied.

11 Furthermore, the Commission respected the legitimate expectations of those concerned by means of the communication of 11 October 1980 (Official Journal, C 264, p. 2) whereby it gave notice of its intention to include the month of October in the system of quotas, and by means of the decision published on the same date (Official Journal, L 268, p. 25) requiring the undertakings to supply information on their production for October 1980.

12 Moreover, the documents produced by the Commission show that it held two meetings with independent Italian producers on 4 and 17 October 1980 in order to inform them of the introduction of a quota system for steel products.

13 Thus even if the Commission did not indicate precisely what the level of quotas would be, which might have prevented the undertakings from determining the precise consequences of the Commission's advice and ensuring that their production was not excessive in relation to the quotas which were to be allocated to them for the whole quarter, the fact is that the undertakings did receive notice of the Commission's intentions.

14 In view of the foregoing the second submission in support of the application must be rejected.

The third submission in the application

15 Ferriere San Carlo is of the opinion that it caused no injury to competing undertakings established in the European Economic Community because it delivered the excess production outside the Community. It argues that therefore, since the contested decision did not take account of that fact, it infringed the provisions of Articles 3 and 4 of the ECSC Treaty, in particular those which require the Commission to enable undertakings to secure a minimum level of financial resources, to maintain the level of employment

and a sufficient production capacity and to promote the orderly expansion and modernization of production.

16 The submission amounts to a preliminary objection which challenges in effect once more the legality of the general decision, Decision No 2794/80.

17 As the Court has already held in response to comparable arguments (judgment of 16. 2. 1982 in *Ferriera Padana SpA*, cited above, and judgment of 7. 7. 1982 in Case 119/81, *Klöckner* v *Commission of the European Communities* [1983] ECR 2627), the applicant's argument fails to appreciate the true purpose of Article 58 within the system of the Treaty as a whole. The provision is intended to enable the Community to deal with a crisis caused by a decline in demand. It provides for the introduction of a system of production quotas which is intended to spread equitably throughout the iron and steel industry of the Community the unavoidable consequences of the adjustment of production to the reduced number of possibilities of disposal.

18 The goal of those restrictive measures is to improve market conditions so as to enable the profitability of undertakings to be maintained or restored in the long term and thereby enable the jobs which depend on it to be preserved as far as possible. However, contrary to the applicant's contentions, Article 58 does not in any way require the Commission to guarantee each individual undertaking a minimum level of production determined in accordance with the undertakings's own criteria of profitability and development. The aim of that article is to spread in the most equitable manner possible amongst all undertakings the reductions required by the economic situation, not to guarantee undertakings a minimum level of employment proportionate to their capacity.

19 As regards in particular the provisions of Articles 2, 3 and 4, mentioned in paragraph (2) of Article 58 and relied upon by the applicant, it should be observed that the general aims set out in those articles must constantly be reconciled with one another in the light of the economic circumstances and therefore priority may not be given to one of those aims to the detriment of the others. As far as the reference in Article 58 (2) to the need "to maintain employment" is concerned, it is made in relation to a regulatory mechanism

to which the Commission has not resorted. It should be added that in establishing the quota system the Commission did not disregard the need to maintain employment as far as possible because it took account, in Article 4 (3) of Decision No 2794/80, of the level of utilization of capacity.

20 The submission must therefore be rejected.

The fourth submission in the application

21 The applicant maintains that the contested decision infringes Article 14 of Decision No 2794/80 and Article 33 of the ECSC Treaty.

22 The Court finds that the applicant has not adduced any evidence in support of its submissions which would enable the Court to determine whether it is well founded. In the circumstances the submission must be rejected.

The fifth submission in the application

23 The applicant maintains that the quota allocated to it for the fourth quarter of 1980 was not adjusted despite the fact that its production potential had increased due to the activation of a new rolling-mill. It is therefore of the opinion that the contested decision infringes Article 14 of Decision No 2794/80, Articles 13 and 14 of Commission Decision No 1831/81/ECSC of 24 June 1981 (Official Journal, L 180, p. 1) and Articles 14 and 15 of Commission Decision No 1696/82/ECSC of 30 June 1982 (Official Journal, L 191, p. 1).

24 The Court notes first that the only provisions which the applicant may usefully rely upon, in view of the fact that the alleged excess production took place during the fourth quarter of 1980, are those contained in Article 4 (4) of Decision No 2794/80, which states as follows:

"Where, further to an investment programme duly reported and not the subject of an unfavourable opinion, the undertaking activates a new plant after 1 July 1980, the Commission shall adapt appropriately the reference production of this undertaking, provided it finds that the new production

possibility thus established brings the total production possibilities for the four groups of products to a level exceeding by at least 15 % the total production possibilities existing for 1979."

25 The Court notes secondly that it is clear from the evidence and in particular from the replies given by the Commission to the questions asked by the Court, which were not contradicted by the applicant, that although the latter requested the Commission several times to verify the improvement in its plant it was only on 26 October 1982, as a result of a further inspection carried out by Commission staff, that it could be established that certain modifications had been made to the plant between August 1981 and February 1982 and that as a result the applicant's production capacity had more than doubled. In the circumstances the Commission, by a decision notified to the undertaking on 22 November 1982, adjusted the undertaking's production quotas with effect from the fourth quarter of 1981 pursuant to Article 13 of Decision No 1831/81.

26 It follows that the applicant is in no respect entitled to request an adjustment of the production quota allocated to it for the fourth quarter of 1980, the only one at issue in this case, and that the aforementioned submission must be rejected.

The sixth submission in the application

27 Finally, the applicant maintains that the contested decision is unlawful because it did not take account of its conduct after 31 October 1980 and in particular of the fact that Ferriere San Carlo closed its works during November and December 1980 in order not to exceed the production quotas allocated to it.

28 The Court considers that this submission must be rejected because in the first place even if it were proven, the fact relied upon by Ferriere San Carlo is wholly irrelevant to the question of the legality of the contested decision, and in the second place it appears from the evidence that its statement is in

fact incorrect: during the quarter in question the applicant produced 3 166 tonnes in October, 2 194 tonnes in November and 2 439 tonnes in December. It is therefore not reasonably possible to maintain that the applicant ceased operations during November and December 1980.

29 It follows from the whole of the foregoing that the claim in the application to the effect that the contested decision should be declared void must be rejected.

The alternative claim for a reduction of the fine

30 The Court notes first that the fifth and sixth submissions considered previously, which may be regarded as arguments presented in support of both the claim for a declaration that the contested decision is void and the claim for a reduction of the fine, have been rejected because they are based on allegations which have proved to be false.

31 Secondly, although the applicant maintained that payment of the fine imposed on it would force it to close its workshops and to lay off its 30 employees, the Court takes the view that that fact, by itself, is not such as to enable it to reduce the amount of the fine.

32 As it has already held (in its judment of 11 May 1983 in Joined Cases 303 and 312/81, *Klöckner v Commission* [1983] ECR 1507) the system of production quotas would be gravely compromised if every undertaking were able, by pleading emergency due to serious economic difficulties, to excuse itself from observance of the restrictions and to exceed at will the production quota allocated to it. The chain reaction thereby released would culminate in the collapse of the system, so that Article 58 of the Treaty would become a dead letter.

33 Moreover, it appears from the evidence and in particular from the report of the audit carried out on 21 September 1982 at Ferriere San Carlo that although the applicant's financial position does in fact give cause for

concern, the auditors consider that a further financial burden, such as that arising from the fine imposed by the Commission, could be supported if payments could be spread over a period of time. It is clear from the evidence and in particular from the oral proceedings that the Commission is willing to allow Ferriere San Carlo time to pay provided that it is not too long.

34 Thirdly, Ferriere San Carlo maintains that the fine imposed on it, which was based on a uniform rate of 82.5 ECU per excess tonne, infringed the provisions of Article 58 (4) of the ECSC Treaty which provides that the Commission "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". More specifically the applicant is of the opinion that the amount of the fine should not exceed the profit on the excess tonnage, and relies in that respect on the argument presented to the Court by Ferriere di Roè Volciano in Case 234/82.

35 The Court observes, first, that aformentioned provisions of Article 58 of the ECSC Treaty are based on the notion of the value of the tonnages produced in disregard of the quota, not the profit realized in respect of such production, and secondly that the reference to the argument put forward by Ferriere di Roè Volciano is in any case unjustified since that argument was based essentially on the fact that that undertaking operated exclusively as a processor for other undertakings; that is not the case with the applicant. In the circumstances there was no special reason in this case to depart from a strict application of the provisions of Article 58 and the Commission applied it correctly.

36 Finally, although the applicant sought to rely on its good faith the Court has found no reason in that respect to justify a reduction in the amount of the fine.

37 It follows from the whole of the foregoing that the claim for a reduction of the fine must be rejected.

The claim that the Court should grant the applicant "terms and payment periods" taking into account both its financial position and the current situation in the iron and steel industry

38 Claims of this sort which in fact require the Court to issue instructions to the Commission, which alone has the power to grant terms of payment to undertakings which have been fined, are manifestly inadmissible.

Costs

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

On those grounds

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application.**

2. **Orders the applicant 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