

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 1 DECEMBER 1983¹

*Mr President,
Members of the Court,*

The subject of the case before the Court today is a decision given under the steel quota Decision No 1831/81 (Official Journal L 180, 1. 7. 1981, p. 1) imposing a fine for exceeding the quota for the third quarter of 1981 in respect of product Categories V and VI.

Let me first make the following observations about the background to the case.

At the end of November 1980, the applicant informed the Commission that it had accepted an order, at the beginning of September 1980, for delivery of some 22 000 tonnes of steel reinforcing bars for Libya of which 14 000 tonnes were to be delivered in the fourth quarter of 1980. Accordingly it applied, pursuant to Article 14 of Decision No 2794/80 (Official Journal L 291, 31. 10. 1980, p. 1), for an increase in its allocated production quota for the fourth quarter of 1980. The Commission granted that application on 23 December 1980, having already, on 15 December 1980, adjusted the applicant's quotas for the fourth quarter of 1980 in respect of product Category IV and crude steel, and, in view of the large order destined for a non-member country, adjusted the crude steel quota and increased the production quota for product Category IV from 19 826 tonnes to 24 000 tonnes, that is, up to the level of the reference production. It appears furthermore, though we have no further details, that during the period when Decision No 2794/80 was in force, the applicant's

reference production was adjusted under Article 4 (5) of that decision.

On 6 April 1981, the applicant accepted a further order for 30 000 tonnes of reinforcing bars for delivery to Libya, to be fulfilled in the period from May to September 1981. It informed the Commission of the order in a letter of 14 July 1981, in which it once again requested an adjustment of its production quota pursuant to Article 14 of Decision No 2794/80 and also the application of Article 4 (5) of Decision No 2794/80 for the third quarter of 1981.

Soon afterwards, the Commission informed the applicant by a letter of 4 August 1981, that its production quota for product Categories V and VI was for the third quarter of 1981 17 974 tonnes of which 10 790 tonnes could be delivered within the common market. A few days later, on 7 August 1981, the Commission replied in the negative to the request contained in the applicant's letter of 14 July 1981. The Commission decision pointed out that the applicant's reference production had been adjusted to take account of its special situation during the period when Decision No 2794/80 was in force and it had also been taken into account pursuant to Article 7 (a) of Decision No 1831/81 when the reference production was calculated according to the new rules for fixing steel quotas.

The applicant approached the Commission again on 2 September 1981. It explained that in the period from May to August 1981, it had delivered 15 950 tonnes of the above-mentioned order.

1 — Translated from the German.

The remaining deliveries of some 7 000 tonnes each to be made in September and October 1981 could not be effected within the allocated production quota and therefore the applicant must insist on an increase in its production quota. In a letter of 16 September 1981, the applicant referred explicitly to Article 14 of Decision No 1831/81, as amended by Decision No 1832/81 (Official Journal L 184, 4. 7. 1981, p. 1) and pointed out that if an increase in its quota was not forthcoming, it would be forced to cease production. In a further letter of 17 November 1981 the applicant set out how the deliveries to Libya had been organized: 1 840 tonnes in May 1981, 5 850 tonnes in July 1981 and 12 500 tonnes in the third quarter of 1981. It further pointed out that, because of the lateness of the Commission's negative answer, a final delivery of 5 600 tonnes in October 1981 had had to be abandoned and contended that the Commission had not taken account of the fact that the applicant had already reduced its production by a considerable amount. Finally, the applicant pointed out, in a letter of 14 December 1981, that its Libyan customer was claiming damages because the Commission had made it impossible for the applicant to meet the export order fully and it could therefore not expect such an order in the next quarter.

Since the applicant did not secure a change in the allocated production quotas for the third quarter of 1981 and since it had actually produced 4 999 tonnes more than it had been allocated in product Categories V and VI, the Commission, by a letter of 25 February 1982, initiated the procedure for the imposition of sanctions.

In that context, the applicant pointed out in its first statement of 4 March 1982 that roughly 70% of the production allocated to it for the third quarter of 1981 had been exported to Libya and it could therefore be accepted that the excess production which the Commission regarded as unacceptable had gone entirely to markets in non-member countries. At a hearing on 28 May 1982, the applicant also pointed out that the aforementioned export contract had ensured its survival since, even before the introduction of the quota system, it had been working at only about 50% of capacity and because of the production quotas this had dropped to only 20%. It also contended that it would have been too expensive to acquire the goods to meet the export contract elsewhere because the applicant's price delivered would then have been exceeded. It also explained that it had not considered buying quotas because it did not regard such transactions as reputable and because in this way its price delivered would once again have been exceeded.

On 24 November 1982, the decision mentioned at the beginning imposing the fine pursuant to Article 12 of Decision No 1831/81, was adopted. In it, the Commission explained that it had reacted negatively to the applicant's request for an adjustment in view of the deliveries to Libya because the grounds advanced therefor by the applicant had already been taken into account in the determination of the production quotas for the third quarter of 1981 and there could therefore be no further claim to an adjustment. In view of the unauthorized excess production of 4 999 tonnes in product Categories V and VI, it went on to impose a fine of 374 925 ECU (LIT

502 601 959), calculated at a rate of 75 ECU per tonne of excess. The fine was to be paid within two months of service of the decision on the applicant and would increase by 1% per month if payment was delayed.

On 31 December 1982, the applicant brought proceedings before the Court seeking a declaration that the decision was void or, in the alternative, a reduction in the fine or an extension of time for payment.

In a separate application, it sought to have the operation of the decision suspended. Operation of Article 2 of the contested decision was suspended by an order of 20 April 1983 on condition that the applicant produced a bank guarantee ensuring payment of the fine and default interest.

My view of this case is as follows:

1. When the applicant's argument is analysed from a legal point of view, it becomes apparent that it relates mainly to the correctness of the decision determining the applicant's quota inasmuch as it is contended that the Commission failed to adjust the quota so that it would cover the applicant's actual production during the quarter in question. The complaint that Article 14 of Decision No 2794/80 and Article 14 of Decision No 1831/81 were not applied is part of the same contention. In the applicant's view, they ought to have been applied in view of the exceptional difficulties caused by the allocation of quotas and because the deepening of the crisis in the steel market should have led to encouragement of exports. The same is true of the applicant's view that the

Commission should have taken into account, pursuant to Article 4 (5) of Decision No 2794/80, the fact that the applicant until 1974 had operated only a small outdated rolling-mill and when that had been dismantled in 1975 had brought new, higher-capacity equipment into operation in 1975; it had then substantially reduced its production on the basis of recommendations to do so during the reference period provided for in Decision No 2794/80.

These arguments cannot be further examined in proceedings relating to the fine because even though Article 36 of the ECSC Treaty allows an applicant to contest the legality of the decision for failure to observe which it is to be punished with a fine, it is none the less also clear from the case-law that that does not apply to *individual* decisions which have not been contested in time. I refer in this connection to the judgment in Case 36/64¹ and to the recent judgment in Case 265/82.²

It must be borne in mind that the applicant had already applied for an increase in its production quota on 14 July 1981, referring both to Article 14 of Decision No 2794/80 and to Article 4 (5) of the same decision. It renewed its request for an adjustment of its quota on 2 September 1981 referring to the export order which it had obtained and, on 16 September 1981, referred also to Article 14 of Decision No 1831/81 in relation to its request. The Commission had already replied to this in the negative on

1 — Judgment of 2. 7. 1965 in Case 36/64 *Société Rhénane d'Exploitation et de Manutention (Sorema) v High Authority of the ECSC* [1965] ECR 329.

2 — Judgment of 19. 10. 1983 in Case 265/82 *Union Sidérurgique du Nord et de l'Est de la France (Usinor) v Commission of the European Communities* [1983] ECR 3105.

7 August 1981 and apparently sent the applicant a further negative decision which caused it to abandon performance of the remainder of the export order. This course of events ought to have led the applicant to contest the question of the adjustment of its quota. In this way, it would have been possible to examine whether or not it could be regarded as sufficient that the adjustment of the quota under the terms of Decision No 2794/80 should be brought into the determination of the reference production under Article 7 a of Decision No 1831/81. It would also have been possible to look into the question whether or not it was objectionable that the adjustment clause in Article 14 of Decision No 1831/81, as amended by Decision No 1832/81, was linked to extremely restrictive conditions which the applicant, because its total reference production for product Categories V and VI was more than 60 000 tonnes per year, could not meet. On the other hand, it is certainly now no longer possible to examine whether or not the Commission was right in refusing to adjust the applicant's quota and thus all arguments relating basically to the question whether or not the calculation of the quota which the applicant is accused of exceeding was correct must be left out of consideration.

I should also like to add in this connection however that the contract for export to Libya which the applicant accepted at the beginning of April 1981 and which was apparently to be fulfilled by October 1981 is at the centre of the applicant's attempts to find legal justification for its actions. It is conceivable that with proper planning, a large part of the contract could have been fulfilled in the second quarter of 1981. The idea must thus have suggested itself to the applicant, in the light of these circum-

stances, to apply for an increase under Decision No 2794/80, which was still in force, for the second quarter of 1981 in the same way as it had applied at the end of 1980, and it is hard to imagine that it would have met with a refusal. One is entitled to ask why the applicant did not make use of the possibility, and I have the impression that it did not handle the export contract which gave rise to its difficulties with sufficient prudence. It is thus not entirely innocent as regards the excess which occurred in the third quarter of 1981.

2. The other arguments advanced by the applicant in support of its application can, in my opinion, (since the applicant has unfortunately not attempted to define them), only be put into the categories "culpability" and "seriousness of the offence". Let me say straight away that these considerations do not provide any grounds for declaring void the Commission decision imposing the fine or amending it in favour of the applicant.

(a) It was thus contended that in accepting the export contract on which the applicant mainly relies, the latter was behaving in conformity with the Commission's observation in its decision of 23 December 1980 to the effect that it was in the interest of the Community steel industry that such patterns of trade should be maintained. It also could not foresee at that time — and here it is referring to the fact that the contract was accepted in April 1981 but was in large measure to be fulfilled after the expiration of Decision No 2794/80 — whether or not the quota system would be continued and, if it was extended,

how it would be structured. The applicant also contends that when it was informed of its quota for the third quarter of 1981 and the restrictive attitude of the Commission to export deliveries, the deliveries to Libya had already used up 70% of its production quota and, on account of its domestic customers, it could not also use the rest of its quota for that purpose. Nor could it, because of the cost, consider buying quotas so as to meet the wishes of all its customers.

12 500 tonnes of its production to Libya in the whole of the third quarter, and when that is compared to the applicant's statement on 2 September 1981 to the effect that 15 950 tonnes in all were exported between May and August 1981, the only conclusion is that at the beginning of August — at the time at which the quotas were being communicated — at most some 8 200 tonnes of the applicant's production had already been used for export.

It must be added that the complaint that the Commission informed the applicant very late of its quota for the third quarter of 1981 and thereby contributed to a considerable extent to exacerbating the predicament of which the applicant complains, is surely unjustified. The Commission has rightly pointed out that, from the time Decision No 1832/81 was published at the beginning of July 1981, the undertakings concerned were aware of the essential features of the new system and could therefore obtain without difficulty some idea of the size of the production quotas. They could also get precise information about the permissible production by telephoning the Commission in good time. It also seems inappropriate that the applicant, at the very time at which it was being informed of the quota allocated to it at the beginning of August 1981, had sent off 12 500 tonnes of reinforcing bars to Libya and thereby used up 70% of its production quota. It may be deduced from information supplied elsewhere by the applicant that after deliveries amounting to 7 690 tonnes in the months of May and June, it had disposed of

We may also wonder whether the applicant was not negligent in not fulfilling a larger part of the export contract in the *second* quarter of 1981, which would have somewhat eased its situation in the following months. Even if the answer must be in the negative because the export contract was so drafted that the major part of the deliveries was to take place in the period after the expiration of Decision No 2794/80, it remains in any event a fact that the applicant's assumption that the problem could be solved as a matter of course seems indefensibly careless. In view of the constantly deepening crisis, it surely could not have operated on the basis that the production quota system would end from July 1981. Since the applicant had already benefited from a substantial increase of 14 000 tonnes in its production quota for the fourth quarter of 1980 in the light of export orders, it can hardly have assumed that in the context of the new quota system, designed to deal with a deepening crisis, it would be granted a further increase in its production quota which would allow it to export 17 000 tonnes in the third quarter of 1981. The aforementioned comments of the Commission in its letter

of 23 December 1980 that it was in the interests of the Community steel industry to maintain such patterns of exports, are not sufficient to justify such an assumption.

(b) The applicant has further contended that excess production of 4 999 tonnes may be compared with exports to non-member countries of 26 340 tonnes, in which figure it appears to have included all deliveries made under the export order in the period from May to October 1981.

Finally, it is not to my mind sufficiently proven that the only way out of the predicament into which the applicant had got itself by carelessly accepting a major export order in the early part of 1981, was to exceed its quota, and that a purchase of quotas was wholly unreasonable. In the administrative proceedings, the applicant claimed only that trade in quotas was not reputable and later contended that it would have lost money had it bought quotas because the price of goods exported was lower than the price for goods sold in the Common Market. That argument would in fact be convincing only if the sole reason for buying the quotas was to make its exports possible. That was not necessarily the case since the applicant's total production for the third quarter of 1981, including the unauthorized excess production, was 22 973 tonnes of which only 12 500 tonnes were exported. It may definitely be concluded therefore that the applicant's excess production, or at least a large part of it, went to traditional customers in the common market, for which purpose a purchase of quotas was not necessarily loss-making.

If that is meant as an expression of the idea that the excess production was to be attributed to exports the simple answer is that that aspect is entirely without significance. It has long been established case-law that exports have rightly been included in the quota system (see, for example, the judgment in Case 244/81¹ and hence that, as far as production is concerned, what matters is solely the observance of the quota allocated and not the purpose for which the production has been used.

Should the applicant with its reference to the size of its exports wish to argue that more than half of its actual production for the third quarter was exported and that that should be taken into account in judging the *seriousness* of the infringement of which it is accused, it might be said that though such an argument may not be regarded as entirely unjustified as regards the amount of the fine, it is not a ground, in this case, for modifying the decision imposing the fine. Pursuant to Article 12 of Decision No 1831/81, where the quota has been exceeded by more than 10%, which it was in the applicant's case, a higher fine may be imposed.

When all this is borne in mind, there can be no question of declaring the applicant entirely free from blame and of justifying the excess production of which it is accused simply by the existence of a difficult situation which could not be avoided.

¹ — Judgment of 11. 5. 1983 in Case 244/81 *Klückner-Werke AG v Commission of the European Communities* [1983] ECR I451.

Since the Commission refrained from such action and applied the rule in Article 12 (1) (75 ECU per tonne of excess), there are no reasonable grounds for reducing the fine yet again on the basis of the relationship between the applicant's excess production and the size of its exports.

3. As regards the applicant's alternative claim that it be granted an *extension of time for payment*, there is now no need to examine whether Article 36 of the ECSC Treaty also allows such a possibility or whether it is limited to enforcement

proceedings. It is sufficient to note, on the one hand, that the applicant has advanced no particular grounds for this claim and, on the other, that the Commission, as it has already explained in other proceedings, is prepared to grant appropriate facilities to undertakings for which payment of the fine creates difficulties. As far as the conditions of payment are concerned therefore the applicant should make a reasoned application to the Commission. It would however be inappropriate to include any mention of that in the judgment to be delivered on the subject of the contested decision.

4. On the basis of the foregoing I can only propose that the Court should dismiss the application as unfounded and order the applicant to pay the costs of the proceedings including those of the application to suspend the operation of the decision.