merely refers to fines "not exceeding the value" of the excess production, and in the light of the term "generally" contained in Article 9 itself, in no way precludes the Commission from modifying the amount of the fines, having regard to the circumstances of the infringement.

In Case 188/82

THYSSEN AG, having its registered office in Duisburg (Federal Republic of Germany), represented by Jochim Sedemund, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 2 Rue Goethe,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Mr Götz zur Hausen, a member of the Commission's Legal Department, acting as Agent, assisted by Professor Eberhard Grabitz, of the Free University of Berlin, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission's decision of 11 June 1982 imposing a fine on the applicant is void,

THE COURT (Fourth Chamber)

composed of: T. Koopmans, President of Chamber, K. Bahlmann, P. Pescatore, A. O'Keeffe and G. Bosco, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

By Decision No 2794/80/ECSC of 31 October 1980 (Official Journal 1980, L 291, p. 1), the Commission of the European Communities established a system of production quotas for steel undertakings. Pursuant to that decision, the Commission allocated production quotas to Thyssen AG, Duisburg, for the fourth quarter of 1980. Those quotas, which were notified to Thyssen on 3 November 1980, included a quota for products in Group I (hot-rolled wide and narrow strip) which was fixed at 1 159 701 tonnes.

By a telex message of 11 November 1980 Thyssen informed the Commission that, in its opinion, the latter quota had been incorrectly determined.

The Commission recognized that an error had been made in the calculation of the quota and, by a decision of 11 December 1980, which was notified to Thyssen on 17 December 1980, it increased the quota to 1 227 736 tonnes.

In the first quarter of 1981 Thyssen exceeded by 3 851 tonnes the quarterly production quota allocated to it by the Commission for products in Group I. The quantity produced in excess of the quota was supplied to Stahlwerke Bochum, a producer of electrical sheet.

On 11 June 1982 the Commission imposed on Thyssen, on the ground that it had exceeded the quota, a fine of 288 825 ECU, which is to say 75 ECU per tonne of excess production.

On 24 July 1982 Thyssen instituted proceedings to contest that decision.

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 it requested the parties to provide it with certain information before the hearing and to answer certain questions.

The Court also decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the Fourth Chamber.

II — Conclusions of the parties

Thyssen claims that the Court should:

1. Declare that the defendant's decision of 11 June 1982, addressed to the applicant and received by it on 18 June 1982, concerning a fine imposed on the applicant pursuant to Article 58 of the ECSC Treaty is void; and

2. Order the defendant to pay the costs.

The *Commission* contends that the Court should:

1. Dismiss the application; and

2. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

In its *first submission, Thyssen* claims that it was fined for exceeding a quota established in respect of a product which would not have been included within the quota system if Article 58 of the ECSC Treaty had been correctly applied. In its opinion, the Commission's general decision, Decision No 2794/80, which constitutes the basis for the decision imposing the fine, should have exempted from quotas both electrical sheet and the raw materials (hot-rolled wide strips) intended for the manufacture thereof. By not granting those products exemption, the decision infringes a number of rules and principles of Community law and should therefore be regarded as invalid.

In that regard, Thyssen observes, in the first place, that the Commission made an incorrect appraisal as regards the existence of a "manifest crisis", within the meaning of Article 58 (1) of the ECSC Treaty, in a market such as that in electrical sheet which has been stable and well-organized for several years. In the absence of a manifest crisis, the conditions for the establishment of a quota system are not fulfilled.

Since the demand for the raw materials intended for the production of electrical sheet is strong, the extension to those raw materials of the general reductions in production inevitably leads to a serious shortfall in supply to manufacturers of electrical sheet; that is incompatible with Article 3 (a) of the ECSC Treaty, which provides that the institutions are to "ensure an orderly supply to the common market". Since production is thus artificially kept below demand, consumers are obliged to deal with manufacturers established in non-member countries or with producers of substitute materials, which leads to a permanent weakening of the market. That is contrary to Article 3 (d) of the Treaty, which entrusts the institutions with the task of ensuring "the maintenance of conditions which will encourage undertakings to expand and improve their production potential".

Moreover, the general decision contravenes the principle of equal treatment laid down in Article 4 of the Treaty by providing in Article 6 for the exclusion from the quota system of certain products, such as tubes and tin-plate, which were in a similar market situation to electrical sheet. It also produced adverse effects on employment in the undertakings concerned, whereas the second paragraph of Article 2 of the Treaty expressly requires the Community to safeguard continuity of employment. It is difficult to understand to what end the Commission sacrificed security of employment. In any event, it was certainly not in pursuance of the fundamental objective of Article 58, namely the adjustment of excessive production to an excessive decline in demand, since the Commission was unable to establish any decline in demand for electrical sheet.

Finally, the Commission adopted the general decision without gathering sufficient information on the state of the market in electrical sheet, contrary to Article 58 (2) of the ECSC Treaty.

The *Commission* raises first of all an objection of inadmissibility as regards the first submission on the ground that the legality of a general decision such as Decision No 2794/80 cannot be

contested under the third paragraph of Article 36 of the ECSC Treaty in the absence of a direct legal connection between that decision and the contested decision. There is no direct legal connection between Decision No 2794/80 and the decision imposing the fine. The applicant would be entitled to claim that Decision No 2794/80 was partially unlawful only if it had challenged — and it did not — the decision fixing the quota for the first quarter of 1981.

In reply, *Thyssen* maintains that its submission is admissible under the third paragraph of Article 36 of the ECSC Treaty on two grounds:

First, since the Court is asked to consider whether a fine imposed for exceeding a production quota is justified, it is necessary to determine whether the quota in question could be fixed validly under Community law;

Secondly, it is clear from previous decisions of the Court that submissions challenging decisions of a general nature are admissible if they are directed against provisions on which the contested individual decision was based. In the present case, the unlawful inclusion within the quota system of raw materials intended for the manufacture of electrical sheet manifestly constitutes the basis for the decision imposing a fine on the applicant, inasmuch as the latter decision was based solely on the additional production of those raw materials.

As regards the substance of the submission, the *Commission* takes the view that it is not possible to assess the existence of a manifest crisis within the meaning of Article 58 (1) of the ECSC Treaty if only certain steel products or certain sectors of the market are considered. That assessment can be made only on the basis of a comprehensive appraisal of the prevailing economic situation on the market in steel. Furthermore, under Article 58 (2), the Commission is required to establish quotas "on an equitable basis". If the only products included within the quota system were those which are difficult to sell, undertakings manufacturing largely or exclusively products which are easy to sell would gain an unjustified advantage.

An exception may be made only if it is shown that the exclusion of a product from the quota system does not affect the balance between products which are difficult to sell and those which are relatively easy to sell. The market surveys undertaken by the Commission before the introduction of the system of production quotas did not allow such a clear conclusion to be drawn as regards electrical sheet. In particular, the discussions which took place in September and October 1980 between the Commission, the undertakings and associations of undertakings, in accordance with Article 58 (2) of the ECSC Treaty, did not make it possible to establish clearly whether there was any justification for excluding materials intended for the manufacture of electrical sheet from the system of production quotas. Only later did it emerge from a survey of market trends that raw materials intended for the manufacture of electrical sheet could be accorded the same treatment as tin-plate and tubes.

In the Commission's view, since raw materials intended for the manufacture of electrical sheet were included within the quota system in order to satisfy the requirement that there should be an equitable apportionment of the burdens resulting from the quota system, the principle of equal treatment has in no way been contravened.

The Commission observes that the objectives set out in the second paragraph of Article 2 and in Article 3 (a) and (d) of the ECSC Treaty obviously cannot all be achieved in full

and at the same time when a system of production quotas is introduced; the fact that they have been achieved only in part cannot be relied upon to contest the legality of that system.

The *second submission* put forward by Thyssen may be subdivided into two parts.

In the first part of its submission, *Thyssen* contends that the difference between the quota notified to it on 3 November 1980 and the higher quota resulting from the adjustment notified to it on 17 December 1980 must be regarded as an additional quota. It may thus be established that the applicant used up its initial quota (1 159 701 tonnes), together with the tolerance margin of 3% permitted by Article 8 (1) of Decision No 2794/80 (amounting to 34 791 tonnes), and that, on the basis of the adjustment notified to it on 17 December 1980, it was entitled to produce a further 70 076 tonnes (the additional quota of 68 035 tonnes plus the tolerance margin of 2 041 tonnes). Since only approximately 57 700 tonnes of that quantity were used up in the final quarter of 1980, Thyssen considers that Article 8 (2) of Decision No 2794/80 authorized it to carry over to the first quarter of 1981 up to 50% of the unused portion of the quota. The portion which it was permitted to carry over is sufficient to cover the quantity, namely 3 851 tonnes, which the applicant is alleged to have produced in excess of the quota.

In reply, the *Commission* states that the decision of 11 December 1980, which was notified to the applicant on 17 December 1980, did not allocate an additional quota to the applicant. Instead it must be regarded as a twofold measure providing for the revocation of an incorrect quota and fixing the correct quota for the fourth quarter of 1980. Accordingly, only a single quota is involved, that fixed on 11 December 1980, which amounted to 1 227 736 tonnes. Thyssen, whose production in the final quarter of 1980 amounted to 1 251 895 tonnes as regards products in Group I, used up that quota and part of the 3% tolerance margin. In those circumstances it cannot rely on Article 8 (2) of Decision No 2794/80 to justify carrying over the unused portion of the tolerance margin, since that provision expressly lays down that only undertakings which have not exhausted their quotas may carry over the unused portion to the following quarter.

In the second part of its second submission, *Thyssen* maintains that the carrying over of the quantity which it was unable to produce in the final quarter of 1980 as a result of the belated notification of the definitive quota must be permitted, irrespective of Article 8 (2), by virtue of the principle that the administration is bound by its own acts and by virtue of the general principle of good faith.

According to the principle of administrative law to the effect that the administration is bound by its own acts, which is also recognized in Community law, the Commission must adhere, in the present case, to the practice which it has followed in comparable cases. That practice, as is apparent from various Commission decisions (decision of 6 April 1981 addressed to Thyssen concerning the carrying over of an increase, notified on 26 January 1981, in the quota for the fourth quarter of 1980; decision addressed to Ferriera Padana concerning the carrying over of an increase, notified on 18 December 1980, in the quota for the fourth quarter of

1980) consists in authorizing an undertaking to carry over in their entirety to the following quarter such portions of quotas as the undertaking concerned was unable to use up owing to the Commission's delay in notifying it of the quotas for a given quarter. The undertakings concerned were able, as a result of those decisions, to make full use of the quota increase belatedly notified to them, including the corresponding tolerance margin. It is of no importance, contrary to the view expressed by the Commission, whether the quota was increased shortly before the expiry of the quarter in question or after its expiry. In both cases, belated notification of the adjustment prevents the undertaking concerned from producing the quantity which it would otherwise have been able to produce. Furthermore, in the case of Ferriera Padana, the undertaking was permitted to carry over the unused portion of the quota, even though the conditions prescribed by Article 8 (2) of Decision No 2794/80 were not fulfilled.

The *Commission* contends that Thyssen has failed to establish the existence in Community law of the principle that the administration is bound by its own acts. Furthermore, even if there is such a principle in Community law, it may be applied only in relation to decisions of a discretionary nature. In the present case, the decision in question was of a mandatory nature. The Commission did not enjoy any discretion in fixing the production quota relating to Group I for the first quarter of 1981.

Moreover, the two cases referred to by Thyssen are not comparable to the present case since in neither of those cases had the quotas been used up in full, whereas the applicant had already exceeded its quota during the fourth quarter. The Commission could not allow the unused portion of the tolerance margin to be carried over since to do so would have amounted to a distortion of Article 8 (2) of Decision No 2794/80, which authorizes only portions of a quota to be carried over.

Thyssen also observes, in the alternative, in the event of the Court's taking the view that the production of the contested 3 851 tonnes did indeed constitute a breach of the quota, that the Commission's action in imposing a fine on that account constitutes a misuse of power. That fine penalizes an act by which the applicant merely offset, at least in part, the effects of a discriminatory error in the calculation of the quotas for which the Commission alone is responsible. The Commission's attitude clearly offends against the principle of good faith, which is recognized in Community law.

The Commission's error prevented Thyssen from exploiting to the full the production possibilities granted to it under Decision No 2794/80 and from supplying certain quantities of products which had been ordered from it, *inter alia* by Stahlwerke Bochum (hereinafter referred to as "SWB"). The applicant therefore sustained a loss in respect of which it is entitled to claim compensation from the Commission.

In the first quarter of 1981, Thyssen was able, as a result of its own efforts, to offset part of that loss in a specific instance which, moreover, was known to the Commission and in respect of which the Commission had accepted the need for a solution.

Whilst acknowledging that there can be no question of claiming a right to compensation for any difficulties occasioned by the Community, Thyssen maintains that the principle of good faith

forbids the Commission to impose a fine on the applicant merely because the latter sought to mitigate the loss with which it was threatened as the result of an error committed by the Commission itself.

As regards the reality of the loss, Thyssen maintains that owing to the failure to supply SWB and its buyers during the first quarter of 1981 with 3 851 tonnes of raw materials they sustained serious losses which were borne by Thyssen.

Thyssen also maintains that, as a result of the belated notification of the quota, it would have sustained a direct and unavoidable loss if it had not supplied the quantity produced in excess of the quota. Contrary to the opinion expressed by the Commission, Thyssen could not have exceeded the initial quota and the tolerance margin before receiving notification of the increase in the quota, even though it considered the initial quota to have been miscalculated. Its internal assessment did not constitute a sufficient basis for disregarding a binding quota notification.

The *Commission* considers it impossible to infer from the principle of good faith that the contested decision is unlawful. It points out that Article 9 of Decision No 2794/80 provides that a fine must be imposed where the quota is exceeded. Since the Commission has no discretion in the matter, the applicant cannot rely on the argument that the Commission's discretion should be curtailed on equitable grounds based on the principle of good faith.

The Commission denies the existence either of a loss or of a direct causal link between the alleged loss and the fact that the decision increasing the quota for the fourth quarter of 1980 was not received by the applicant until 17 December of that year.

The Commission observes that Thyssen referred only to the consequences to which SWB would have been exposed if the quantity of raw materials supplied to it had remained within the limits of the production quotas fixed by the Commission. The applicant has not, however, furnished any information regarding the extent to which the difficulties confronting SWB caused the applicant also to sustain a loss.

Furthermore, even on the assumption that a loss was sustained, Thyssen has failed to establish that such loss was occasioned by the belated notification of the quota. In the Commission's opinion, if the applicant had planned its production properly it would have been able to produce the quantity in question without difficulty.

The argument that the applicant was confronted with an accumulation of unfulfilled orders and the need to comply with the percentage reduction in supplies imposed in such cases by German legislation is too vague to sway the defendant. The figures for Thyssen's daily production in December 1980 show on the contrary that the 3 851 tonnes could also have been produced within the limits of the quota initially set too low. Thyssen did not begin to use the 3% tolerance margin until 16 December 1980.

Without exceeding that margin, it could without difficulty have produced before 17 December 1980 the 3 851 tonnes of

raw materials required by SWB for the production of electrical sheet.

In its *third submission, Thyssen* maintains that the Commission, by imposing a fine on it, contravened both the principle *nemo contra factum suum venire potest* and the principle of the protection of legitimate expectation.

According to Thyssen, at a meeting which took place on 27 November 1980 the representatives of Otto Wolff AG, of Cologne, which together with Thyssen is SWB's parent company, explained to the Commission's representative the reasons why it was absolutely necessary for Thyssen to supply SWB.

On that occasion it was agreed, in view of the impossibility of providing for exemptions forthwith, to adopt a pragmatic solution which, without prejudice to the express exemptions to be provided for, would at the same time take account of the need for a satisfactory settlement.

The Commission stated that it was prepared tacitly to accept production in excess of the quota without adopting an express decision granting exemption. That agreement was referred to by Mr Remy, a member of Otto Wolff's board of directors, in a letter of 3 December 1980 which was addressed to the Commission and failed to evoke any adverse reaction from the latter. Expectations were thus aroused in the applicant and were reinforced by the attitude of the Commission's representatives, who, at a meeting held on 17 December 1980, agreed that the supplies of raw materials required by SWB for the manufacture of electrical sheet and furnished by the applicant were to be unconditionally guaranteed.

In Thyssen's opinion, "promises" of that kind are capable of arousing a "legitimate expectation" even if they are not transformed into an undertaking which is directly legally binding on the defendant.

The *Commission* contends that, since no promise to refrain from imposing a fine in the event of excess production was made by its officials at the meeting held on 27 November 1980, no such inference can be drawn from Mr Remy's letter of 3 December 1980. Moreover, at the meeting held on 17 December 1980, the Commission's officials had stressed that Thyssen was to supply SWB within the limits of the sufficiently large quota allocated for products in Group I.

The Commission adds that even if such promises were actually made they are invalid on legal grounds.

To begin with, a promise which is binding on the Commission can be made only by a competent authority, namely the Commission itself or a member of the Commission authorized to give such undertakings.

What is more, Article 9 of Decision No 2794/80 provides that a fine must be imposed if the quota is exceeded. Since the Commission has no discretion to refrain from imposing a fine, any promise to that effect is unlawful and cannot give rise to any legitimate expectation.

In its *fourth submission, Thyssen* contends that the Commission decision imposing a fine on it contravenes the principle of proportionality inasmuch as it fails to take account of the particular circumstances (the small quantity produced in excess of the quota, the absence of a manifest crisis in the relevant market,

maladministration by the Commission in connection with the notification of the quotas, promises made by the Commission) which, according to the applicant, are the characteristic features of this case. Taken together, those circumstances show that this case is not a normal instance of production quotas being exceeded. In fact, there is an accumulation of unusual factors which warrants an exception being made to the rule since the effect of each of those factors is to mitigate the alleged infringement.

By imposing a fine in spite of those considerations, the Commission adopted an attitude manifestly in contradiction with the principle of proportionality.

The *Commission* emphasizes, in the first place, that under the first paragraph of Article 9 of Decision No 2794/80 it has no discretion to decide whether or not to impose a fine, nor is it at liberty to determine the amount thereof. Moreover, it adds that none of the factors relied upon by Thyssen is capable of calling in question the obligation which the first paragraph of Article 9 of that decision imposes on the Commission to penalize by the imposition of a fine any undertaking which exceeds its quota. Nor are those factors in combination with one another capable of calling in question that obligation. That is also the case as regards the amount of the fine. In particular, no reduction is justified by the fact that the quantity produced in excess of the quota was negligible, since Decision No 2794/80 already takes account of such cases by providing for a 3% tolerance margin.

In its *fifth submission, Thyssen* contends that the contested decision does not contain a sufficient statement of the reasons on which it is based and that it was adopted upon termination of a procedure in which fundamental rights were infringed.

In Thyssen's view, it is impossible to ascertain from the statement of reasons whether the Commission considered the arguments put forward by the applicant during the administrative procedure.

The *Commission*, on the other hand, maintains that it indicated in the statement of reasons that the applicant had expressed its views, both orally and in writing, on the charge that it had exceeded its quotas. This shows that the Commission appraised the facts and arguments relied upon by the applicant. The Commission is under no obligation to refer to all the details of that appraisal in the statement of reasons on which its decision is based.

In *Thyssen*'s view, its fundamental rights were infringed because the Commission, at a hearing which took place on 15 January 1982, made a tape-recording of the proceedings without the knowledge of the applicant's representatives. That recording, made in breach of one of the fundamental human rights which the Court has held to form an integral part of Community law, should not have been used for the puposes of the decision adopted by the Commission.

The *Commission* points out that the recording was used merely to draw up the minutes of the hearing which were notified to the applicant by a letter of 1 February 1982 and on which the applicant expressed its views on 11 February 1982. No part of the Commission's decision is therefore based on that recording. The fact that the minutes were drawn up in writing and approved by the applicant deprives the question of the use of a recording made without the applicant's knowledge of any significance.

In its reply *Thyssen* advances a further argument to the effect that the decision

imposing the fine should in any event be declared void in view of the absence of any fault on its part. The principle *nulla poena sine culpa* should, in the light of previous decisions of the Court, be regarded as forming an integral part of Community law. It is apparent from several factors, such as the promises made by the Commission to tolerate production in excess of the quota, the state of necessity in which SWB found itself, the belated notification of the quotas, the small quantity produced in excess of the quota allocated to the applicant and so on, that there was no fault on Thyssen's part capable of justifying the imposition of a fine. Furthermore, the fact that the Commission, on its own admission, did not even consider the question of fault must also be taken into account in connection with absence of a sufficient statement of reasons for the defendant's decision.

The *Commission*, on the other hand, maintains that the fine provided for by the first paragraph of Article 9 of Decision No 2794/80 is not penal in nature but has as its purpose merely to deprive the undertakings concerned of the advantage which they acquired unlawfully by exceeding the production quota. Accordingly, the application of the first paragraph of Article 9 of Decision No 2794/80 does not presuppose the existence of fault.

IV — Oral procedure

The parties presented oral argument at the sitting on 18 May 1983.

The Advocate General delivered his opinion at the sitting on 6 July 1983.

Decision

1 By application lodged at the Court Registry on 24 July 1982, Thyssen AG, of Duisburg, instituted proceedings under the second paragraph of Article 36 of the ECSC Treaty for a declaration that the Commission's decision imposing on it a fine of 288 825 ECU, or DM 691 802, is void.

2 The contested decision is based on the fact that in the first quarter of 1981 Thyssen exceeded by 3 851 tonnes the production quota allocated to it for the products in Group I under the system of steel production quotas established by Commission Decision No 2794/80/ECSC of 31 October 1980 (Official Journal 1980, L 291, p. 1).

3 The quantity produced in excess of the quota was supplied by the applicant, in fulfilment of an order received in 1980, to Stahlwerke Bochum (herein-

after referred to as "SWB"), a manufacturer of electrical sheet which required the supplies in question in order to ensure continuity of production.

4 Thyssen claimed that the following factors relating to the fourth quarter of 1980 should be taken into account in connection with the infringement of the quota.

(a) The quota of 1 159 701 tonnes notified to Thyssen by the Commission on 3 November 1980 was incorrect.

(b) The correct quota of 1 227 736 tonnes was notified to the applicant on 17 December 1980.

(c) The 3% tolerance margin provided for by Article 8 (1) of Decision No 2794/80 amounted to 36 832 tonnes, on the basis of the adjusted quota.

(d) Thyssen was therefore legally entitled to produce 1 264 568 tonnes in the final quarter of 1980.

(e) Thyssen's actual production during the period in question amounted to 1 251 895 tonnes and part of the tolerance margin, namely 12 673 tonnes, was therefore left unused.

5 Although it does not deny exceeding the quota in the first quarter of 1981, Thyssen contends that:

(a) Decision No 2794/80 is unlawful inasmuch as it wrongly included within the system of production quotas electrical sheet and raw materials intended for the manufacture thereof;

(b) Article 8 (2) of that general decision confers, subject to certain limitations, the right to carry over to the next quarter the unused portion of a quota and the applicant was also entitled to exercise that right in respect of the quantity not produced in the fourth quarter of 1980;

(c) Having developed an administrative practice of authorizing undertakings in the applicant's position to carry over the unused portion of a quota, the Commission could not penalize the applicant for exceeding its quota, without contravening the principle that the administration is bound by its own acts;

(d) Since, owing to a wrongful delay in notifying the quota, the Commission prevented the applicant from producing in 1980 the quantity of steel intended for SWB, it cannot, without contravening the principle of good faith, criticize the applicant for having produced that quantity in the first quarter of 1981;

(e) Certain senior officials of the Commission promised the applicant that a fine would not be imposed if it exceeded its quota solely with a view to supplying SWB with the quantity of raw materials which it needed in order to continue production;

(f) The recording made by the Commission without the applicant's knowledge at a hearing which took place on 15 January 1982 must be regarded as a breach of essential procedural requirements;

(g) The fine was imposed in the absence of any evidence of fault on the part of the applicant; and

(h) The Commission contravened the principle of proportionality, inasmuch as it imposed a fine exclusively on the basis of an arithmetical calculation of the quantity produced in excess of the quota without taking into account the specific circumstances of the case.

6 The argument that the Commission was wrong to include within the quota system electrical sheet and raw materials intended for the manufacture thereof, on the ground that the market in electrical sheet did not contract sharply between 1974 and 1980, was challenged by the Commission, which emphasized that the general crisis in the steel industry had in recent years also extended to the electrical sheet sector. In that regard, the Commission furnished statistics in its reply to the questions put to it by the Court, showing that the average monthly production of electrical sheet in the Community had fallen from 88 920 tonnes in 1978 to 85 250 tonnes in 1979 and to 75 580 tonnes in 1980. At the hearing the Commission also pointed out that in 1980 the production of electrical sheet amounted to approximately 900 000 tonnes, representing a drop of 400 000 tonnes or 29% since 1974, the last year in which the state of the steel industry was satisfactory.

7 In the light of those circumstances, it cannot be denied that the Commission was entitled, without infringing Article 58 or practising discrimination, to consider that there was no reason to exclude electrical sheet from the system of production quotas.

8 As regards the submission based on Article 8 (2) of Decision No 2794/80, it must be noted that that provision refers exclusively to the possibility of carrying over to the following quarter the unused portion of the production quota, whereas the applicant had in fact used up the whole of its quota. Its argument to the effect that in the notification of 17 December 1980 the Commission fixed an additional quota which the applicant was unable to use up entirely, after exhausting the initial quota and the tolerance margin relating thereto, must be rejected. In fact, the applicant was allocated a single quota: namely, the one notified to it on 17 December 1980 in place of the incorrect quota notified on 3 November 1980.

9 As regards the reference to the principle that the administration is bound by its own acts, the Commission has demonstrated that the undertakings which were allowed to carry over the unused portion of their quota had not yet, unlike Thyssen, exhausted their quota and therefore fulfilled the conditions laid down by Article 8 (2) of Decision No 2794/80 for exercising that right. Since the two situations are not comparable, no principle of Community law can be relied upon to support the claim that they should be accorded identical treatment.

10 As regards the submission based on the delay which occurred in the notification of the definitive quota, it must be emphasized that a wrongful act on the part of the Commission cannot justify a breach of Community law by an undertaking, regardless of the economic justification relied upon by the latter.

11 The argument concerning the promise allegedly made by certain Commission officials must also be rejected, since no official can give a valid undertaking not to apply Community law. No legitimate expectation can therefore have been aroused by such a promise, even if one was made.

12 The submission to the effect that essential procedural requirements were infringed as a result of the recording made at the hearing which took place on 15 January 1982 cannot be accepted either. Whilst it is desirable that the Commission should warn in advance the representatives of undertakings who appear at a hearing that it normally records every statement made, for the purpose of drawing up the minutes of the proceedings, Thyssen has not denied in the present case that the minutes of the hearing were forwarded to it in their entirety for its approval and that accordingly no information was included in the file without Thyssen's knowledge.

13 In support of the submission concerning the absence of any fault on its part, Thyssen maintains that, in the light of all the relevant factors, in particular the state of necessity in which SWB found itself, the promises made by certain Commission officials, the questionable legality of the inclusion within the quota system of raw materials intended for the manufacture of electrical sheet, the belated notification of the quota for the fourth quarter of 1980 and the small quantity produced in excess of the quota allocated to the applicant for the first quarter of 1981, it is clear that the applicant was not guilty of any fault which might justify the imposition of a fine.

14 The arguments which the Court has already held to be unfounded when considering the applicant's other submission may be disregarded forthwith. Thus the sole factors which remain to be considered are SWB's state of necessity and the negligible quantity produced in excess of the quota.

15 The argument based on necessity must be rejected. Whatever role that argument may play in Community law in general, an undertaking cannot in any event rely on the alleged necessity of a third party in order to justify its failure to comply with the obligations incumbent upon it under the system of production quotas.

16 As regards the contention that the quantity produced in excess of the quota was negligible, it must be remembered that such production was penalized because it exceeded the 3% tolerance margin fixed by Article 8 (1) of Decision No 2794/80; hence the excess production cannot be regarded as negligible.

17 The Commission was therefore right, even in this case, to abide by the principles governing the infringement of Article 58 of the ECSC Treaty and the resulting imposition of a fine.

18 However, the Court must consider whether the circumstances of the case justify the amount of the fine imposed by the Commission. In that respect, it must be remembered that the applicant pleads a breach of the principle of proportionality, on the ground that the Commission imposed a fine exclusively on the basis of an arithmetical calculation of the quantity produced in excess of the quota without taking into account the specific circumstances of the case.

19 The Commission argues that it is bound by Article 9 of Decision No 2794/80, which provides that the amount of the fine shall "generally" be 75 ECU per tonne of excess production. It states that its administrative practice in applying that provision has invariably been to impose a fine of 75 ECU per tonne of excess production. It nevertheless acknowledges that the imposition of a fine at a lower rate is possible in certain exceptional cases.

20 That reasoning is however based on a misconception of the Commission's powers. Article 9 of Decision No 2794/80, interpreted in the light of Article 58 (4) of the ECSC Treaty, which merely refers to fines "not exceeding the value" of the excess production, and in the light of the term "generally" contained in Article 9 itself, in no way precludes the Commission from modifying the amount of the fines, having regard to the circumstances of the infringement, as the Commission itself recognizes in regard to exceptional cases.

21 It is clear from the evidence before the Court that the Commission's delay in notifying the definitive quota to Thyssen prevented it from producing in the final quarter of 1980 the quantity which it was entitled to produce. As the applicant has demonstrated by means of a very detailed account of the technical requirements of production and of labour legislation in the Federal Republic of Germany, the period between 17 December 1980 and the expiry of the fourth quarter of 1980 was no longer sufficient for it to use up the tolerance margin.

22 Thus it cannot be denied that the applicant found itself in an exceptional situation justifying a different assessment from that made by the Commission as regards the gravity of the infringement and the fixing of the amount of the fine.

23 In that regard, it must be remembered that, under the second paragraph of Article 36 of the ECSC Treaty, the Court has unlimited jurisdiction in appeals against pecuniary sanctions and periodic penalty payments imposed under the Treaty.

24 In view of the exceptional circumstances in which the infringement was committed in the present case, it is appropriate to impose a token fine of 5 ECU, corresponding to DM 12.

25 Under Article 69 (2) of the Rules of procedure, the unsuccessful party is to be ordered to pay the costs. However, under Article 69 (3) where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the parties bear their own costs in whole or in part. Since both the applicant and the Commission have failed in some of their submissions, it is appropriate to make such an order.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. **Reduces the fine imposed on Thyssen Aktiengesellschaft by the Commission to 5 ECU, corresponding to DM 12; and**

2. Orders the parties to bear their own costs.

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 November 1983.

The Registrar
by order

H. A. Rühl
Principal Administrator

T. Koopmans
President of the Fourth Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 6 JULY 1983 [1]

Mr President,
Members of the Court,

1. The principal facts

This case concerns an application by Thyssen AG, a German steel producer, to have declared void the Commission decision of 18 June 1982 imposing a fine of 288 825 ECU on the applicant pursuant to Article 58 (4) of the ECSC Treaty for exceeding the production quota allocated to it for the first quarter of 1981. The applicant contends that the Commission was late in notifying it of the correct production quota for the fourth quarter of 1980, with the result that the applicant was no longer able to use the quota in full. The fact is that on 3 November 1980 a quota of 1 159 701 tonnes for products in Group 1 (rolled products) was allocated to the applicant. The quota seemed to have been miscalculated and the applicant informed the Commission of this on 11 November by telex. By a decision of 11 December 1980, which was notified to the applicant on 17 December, the Commission raised the quarterly quota to 1 227 736 tonnes. The applicant now contends that, as a result of that belated notification, it was unable to fulfil in their entirety certain orders for the supply of raw materials for the production of non-oriented electrical

1 — Translated from the Dutch.