behaviour of the two undertakings was the result of concerted action by them.

That requirement is not satisfied where the undertakings concerned are able to prove that facts which the Commission considered could not be explained other than by a concerted practice can be satisfactorily explained in a way which does not involve such a practice.

3. In order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire which of the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common intent at the time when the agreement was concluded. It is rather a question of examining the aims pursued by the agreement as such, in the light of the economic context in which the agreement is to be applied.

4. Export clauses inserted in a contract of sale which oblige the dealer to export the goods in question to a specific non-member country constitute an infringement of Article 85 of the Treaty when they are essentially designed to prevent the re-export of the goods to the country of production so as to maintain a system of dual prices and restrict competition within the common market.

5. However a reciprocal assistance contract between producer undertakings might generally be evaluated in relation to the prohibitions contained in Article 85 of the Treaty, such a contract is prohibited if it appears that the conditions for its application are so wide and so vague that they may be used to restrict competition.

That is the case, for example, where the undertakings to provide mutual assistance do not just relate to cases of *force majeure* and comparable situations, but to all cases of "serious disruption", of whatever kind and from whatever source, particularly if the contract is concluded for an indeterminate period and if large quantities of products are involved.

In Joined Cases 29 and 30/83

(1) COMPAGNIE ROYALE ASTURIENNE DES MINES SA, whose registered office is in Paris, represented by Ivo van Bael and Jean-François Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicant in Case 29/83,

and

(2) RHEINZINK GMBH, whose registered office is in Datteln (Federal Republic of Germany), represented by its directors, Volker Groth and Rolf Wölfer, assisted by Rainer Bechtold, Rechtsanwalt of Stuttgart, as representative *ad litem,* with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe-II,

applicant in Case 30/83,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented in Case 29/83 by its Legal Adviser, Giuliano Marenco, and in Case 30/83 by its Legal Adviser, Norbert Koch, acting as Agents, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that, to the degree set out in the conclusions of the applicants, Commission Decision 82/866/EEC of 14 December 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.629 — Rolled zinc products and zinc alloys — Official Journal L 362, p. 40) 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: S. Rozès
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

TABLE OF CONTENTS

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 procedure

1. The applicants

The two applicant companies are among the six largest producers of zinc in the European Community.

The Compagnie Royale Asturienne des Mines (hereinafter referred to as "CRAM"), the applicant in Case 29/83, is a French company whose main factory is at Auby-les-Douai, in the North of France. It exports a not insignificant part of its production of rolled zinc, in particular to the Federal Republic of Germany. The company also has mining, industrial and commercial interests in Spain, Morocco and Norway.

Rheinisches Zinkwalzwerk GmbH & Co. (hereinafter referred to as "RZ") is a German company specializing in the rolled zinc sector. On 8 December 1981, it was transformed, with effect retroactive to 1 October 1981, into a limited liability company under the name of Rheinzink GmbH (hereinafter referred to as "Rheinzink"). That transformation took place pursuant to the Umwandlungsgesetz (German Law on the Transformation of Companies). Rheinzink is the legal successor of RZ. The contested Commission Decision of 14 December 1982 is addressed to RZ, which, at that time, was part of the international Metallgesellschaft group. Since 1 October 1982, three German undertakings have shared the capital of Rheinzink, the applicant in Case 30/83.

2. The purpose of the applications

The present applications are aimed at the same Commission Decision, that of

14 December 1982 — 82/866/EEC — relating to a proceeding under Article 85 of the EEC Treaty (Official Journal L 362, p. 40). That decision records various infringements of Article 85 committed by five undertakings producing rolled zinc, including the applicants. The latter contest only part of that decision.

The infringements which are the subject of the present applications concern in particular measures to protect markets taken by CRAM and RZ in 1976, on the one hand, and a reciprocal assistance contract concluded in 1974 between the two applicants and a third undertaking, the company Vieille Montagne, whose registered office is in Angleur (Belgium), on the other. As regards the measures to protect markets, the Commission found, in its decision, two distinct infringements of Article 85. In the first place, CRAM and RZ are said to have acted in concert in 1976 to protect the German market against parallel imports of rolled zinc products being made by a Belgian company, Gebr. Schiltz NV (hereinafter referred to as "Schiltz"). In the second place, CRAM and RZ, it is said, both concluded contracts with Schiltz in 1976, whereby the latter was required to sell rolled zinc products in a specific non-member country so as to limit the risk of parallel imports into the European Community.

The fines were only imposed for the concerted practices which took place in 1976 between CRAM and RZ.

In its application CRAM, the applicant in Case 29/83, contests the decision in question in so far as it relates to the concerted action taken in 1976. Rheinzink, the applicant in Case 30/83, contests all of the above-mentioned parts of the decision.

3. The contested decision

For the purposes of the present applications, the relevant provisions of the decision are as follows:

"Article 1

1. The concerted action taken in 1976 by CRAM and RZ with a view to protecting the German market against parallel imports of rolled products by Schiltz constitutes an infringement of Article 85 of the Treaty.

2. The agreement concluded in 1976 between CRAM and Schiltz on the one hand, and between RZ and Schiltz on the other requiring the latter to resell rolled zinc products in a specific country with the object of restricting parallel imports into the Community constituted an infringement of Article 85 of the Treaty.

Article 2

1. For their involvement in the infringement referred to in Article 1 (1), the following fines are hereby imposed on the following undertakings:

CRAM, a fine of 400 000 (four hundred thousand) ECU, i. e. FF 2 625 000,

Rheinisches Zinkwalzwerk GmbH & Co., a fine of 500 000 (five hundred thousand) ECU, i. e. DM 1 157 230.

2. ...

Article 3

The reciprocal assistance contract dated 5 August 1974 between CRAM, RZ and VM constitutes an infringement of Article 85 of the Treaty.

(. . .)

Article 6

The parties referred to in Article 7 are hereby ordered to bring to an end forthwith the infringements established and to refrain in future from any contractual provision or concerted practice having the same effect.

Article 7

This Decision is addressed to:

1. In its entirety:
   Compagnie Royale Asturienne des Mines
   42 Avenue Gabriel
   F-Paris Cedex 08;

2. As regards Articles 1, 2 and 3:
   Rheinisches Zinkwalzwerk GmbH & Co.
   Bahnhofstraße 90
   D-4354 Datteln;

3. . . .

4. . . .

5. . . .

(. . .)."

4. The facts on which the contested decision is based

A — The measures to protect markets

During the period from 1974 to 1977, the prices of zinc on the French and German markets were higher than those charged in the other countries of the Community. Noticeable price differences also existed in comparison with the prices charged in certain non-member countries. However, the prices charged by the two applicant undertakings in one and the same country differed from each other only slightly.

In order to benefit from those price differences, the German company Kestermann, arranged with Schiltz, a Belgian importer of sanitary equipment, that the latter would buy rolled zinc products from CRAM and RZ, on the terms applied by those producers to their sales in Belgium, and then sell the products to Kestermann with a view to their disposal in the Federal Republic of Germany.

At the beginning of 1975, with a view to carrying out such parallel imports, Schiltz ordered rolled sheets from CRAM. CRAM refused to supply them on the ground that, although the dimensions requested were widely sold in Germany and France, there was no demand for them in Belgium. Subsequently, Schiltz tried to obtain the same sheet metal by informing CRAM that it was intended for re-export to Egypt. On that express condition, CRAM agreed to supply the goods requested and quoted Schiltz a price even lower than that offered in Belgium.

Schiltz was thus able, between February and October 1976, to secure a commitment from CRAM that it would supply a total of almost 2 000 tonnes of rolled products. CRAM, for its part, attached importance to strict compliance with the condition concerning export to Egypt. In that regard, the contested decision refers to certain invoices endorsed "destination Egypt". Further-

more, in various items of correspondence, Schiltz was reminded of its undertaking and asked to prove that it was being complied with by sending the relevant documents.

From April to October 1976, Schiltz used the same stratagem *vis-à-vis* RZ. Again under the pretext of exporting to the Middle East and in particular to Egypt, Schiltz ordered a total of 1 252 tonnes of rolled zinc products from RZ. Those orders were fulfilled by RZ at the prices then charged by that firm for its sales in Belgium, which were, at least initially, 19% lower than those which it charged on the German market. The contested decision points out that initially, at least, RZ delivered goods to Schiltz at prices identical to those charged at the time by CRAM for its deliveries to Schiltz.

As in the case of orders from CRAM, RZ's supplies were granted to Schiltz on the express condition that they were re-exported to the Middle East, and this is confirmed by certain telex messages from RZ quoted in the contested decision. That destination was accepted by Schiltz, which, for example, confirmed, by telex message of 26 October 1976, an order for 550 tonnes accompanied by the following instructions: "Delivery, one tonne pallet free-at-port Antwerp Dock 130 at the premises of our charterer 'United Stevedoring'. Ask for 'John'. Each pallet must be marked 'Genoa-Alex'. Destination: via Genoa to Alexandria and Iran".

However, instead of being loaded on to ships bound for the Middle East, the products ordered from CRAM and RZ were stored at the port of Antwerp, only to be loaded shortly afterwards on to lorries bound for Germany. So that the change of destination could not be discovered by examination of the foreign trade statistics, Schiltz declared the goods to the customs authorities as "double galvanized sheet metal".

This system of parallel imports came to an end in October 1976.

Between 8 September and 11 October 1976, CRAM accepted three further orders from Schiltz for 240 tonnes and 631 tonnes of rolled zinc intended for Egypt and 44 tonnes of rolled products to be re-exported to Iran. Those orders were confirmed. On 13 October 1976, CRAM started to deliver the orders at the rate of about two lorry-loads a day. The deliveries continued until 20 October, when they were suspended without any explanation. At that date, 20 tonnes out of the new order for 240 tonnes of rolled products intended for Egypt remained to be delivered.

On 21 October 1976, the date on which CRAM suspended its deliveries, RZ accused Schiltz of not having observed the condition relating to export to Egypt. RZ made its last delivery to Schiltz on 28 October 1976. Following visits made by two of its employees on 27 October to Schiltz and on 29 October to Kestermann, RZ considered that it had proof that its rolled products were being re-imported into Germany. On 29 October 1976, therefore, it decided to cease dealing with outstanding orders.

At that time, CRAM and RZ were maintaining regular contact in connection with their trading policies and, in particular, their prices, as can be seen from the telex that RZ sent to CRAM on 26 October 1976:

"Change in prices of zinc semi-finished products in Germany

As a result of exchange rate trends and the resulting fall in raw material prices, the domestic German price of zinc in strip and sheet form has dropped from DM 318.20/100 kg to DM 307.90/100 kg with effect from 26 October 1976.

Basic gage: 0.70 mm.

This price applies to quantities of at least five tonnes carriage paid. The current price differentiation according to different gages remains unchanged.

This is for your information.

Signed: MFG, Meyer, Rheinzink, Datteln."

On Monday 8 November 1976, CRAM telephoned Schiltz, accusing it of having diverted to Germany all or part of the goods intended for Egypt. On 12 November, CRAM called upon Schiltz by telex to settle eleven outstanding invoices for October. That telex also included the following message:

"2. You will have to furnish proof that the 240 tonnes have been exported to Egypt, as you promised in your orders of 7 September 1976 and 8 September 1976. We confirm our telephone conversation of 8 November 1976 when we pointed out that, according to our agents in Germany, the rolled zinc products we supplied to you for export to Egypt have been sold in whole or in part on the German market. In view of the special rates we quoted you for export to the Middle East, we feel this is a breach of good faith which justifies the above demands.

3. Not until points 1 and 2 have been settled will we discuss with you the question of the deliveries concerning the 631 tonnes for Egypt plus 44 tonnes for Iran . . ."

In its Decision of 14 December 1982, the Commission deduced, from all of the facts set out above, the existence of a concerted practice, in 1976, between CRAM and RZ, the main purpose of which was to protect the German market in respect of sales of the products in question. In its legal assessment of the facts, it points out that it was during the same brief period from 21 October 1976 (cessation of deliveries by CRAM) to 29 October 1976 (cessation of deliveries by RZ) that CRAM and RZ exerted pressure on Schiltz in order to induce it to cease its exports to the Federal Republic of Germany.

The Commission then refers to the telex of 26 October 1976 in which RZ informed CRAM of its reduction in prices of about 3% on the German market; that notification was devoid of purpose as between competitors other than as part of a concerted effort to combat together parallel exports to that market. Finally, the Commission states that it is significant that CRAM awaited the outcome of the inquiries conducted by RZ in regard to Schiltz and Kestermann before demanding from

Schiltz, on 8 November 1976, payment of the sums which were owed to it. It concludes that, in those conditions, concerted action cannot be doubted.

B — The reciprocal assistance contract between CRAM, RZ and Vieille Montagne (hereinafter referred to as "VM")

On 5 August 1974, CRAM, RZ and VM concluded a contract whereby they undertook to supply each other with rolled zinc products in the event of serious disruption resulting in the significant loss of production at any one of their factories, for whatever reason. Assistance was to be forthcoming as soon as the production shortfall of the undertaking availing itself of the agreement exceeded 20 tonnes per day, or a total of 200 tonnes. The procedure was as follows:

"Article 4.2: Each contracting party undertakes to effect delivery of not more than 1 500 tonnes on condition, however, that its own production is not disrupted. Where only one contracting party suffers a loss of production, it may only require that the shortfall be made up equally by the other two contracting parties . . .

Article 4.3: Where two contracting parties are affected simultaneously by a total loss of production, the third contracting party undertakes to supply not more than 2 000 tonnes per month to make up for the quantities lost and to divide that amount equally between the two contracting parties concerned, unless one of them asks for a smaller quantity. In the event of a partial loss of production by one or both contracting parties, the supplier shall determine the quotas corresponding to the losses in question . . ."

The contract was valid until 31 December 1976 and was to be renewed for successive periods of one calendar year unless terminated in writing at least six months before the end of a calendar year by one or two contracting parties. At the end of 1979, none of the three undertakings had availed itself of its right to terminate the agreement.

According to the contested decision, since the contract entered into force, it has been applied during the following periods and in the following circumstances:

(a) From April to June 1977, by the delivery by CRAM to VM, following stoppage due to a strike at the latter's plant, of 2 427 tonnes of rolled zinc products;

(b) From May to August 1977, again because of the strike, by the delivery by RZ of 850 tonnes of rolled zinc products to VM's German subsidiary;

(c) In 1977, by the delivery by RZ to CRAM, following technical problems with the latter's slitting line, of 550 tonnes of rolled products under an "open-ended" contract for a total of 750 tonnes. These deliveries were stopped as soon as the defective machinery was again working properly.

According to the Commission, the aforementioned contract is an infringement of Article 85 of the Treaty, because a contract of such general scope and of such long duration institutionalizes mutual aid in lieu of competition and is thus likely to prevent any change in the respective positions on the market in question.

5. Procedure

By application lodged at the Court Registry on 23 February 1983, CRAM instituted proceedings against the Commission's Decision of 14 December 1982, seeking a declaration that Article 1 (1) of the said decision is void. By an application registered at the Court on 25 February 1983, Rheinzink instituted proceedings against the above-mentioned decision in so far as it was concerned by it.

The written procedure followed its normal course in both cases. However, in Case 29/83 the applicant waived its right to reply.

By order of 23 November 1983 the Court assigned both cases to the Fourth Chamber, pursuant to Article 95 (1) of the Rules of Procedure.

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 Commission to reply in writing to the following question:

"Would the Commission submit any evidence which will enable the Court to assess the possibility of concerted action having been taken by Rheinzink and the Compagnie Royale Asturienne des Mines with regard to the level of prices charged by those two undertakings for sales in respectively France and the Federal Republic of Germany, such as might explain the inclusion of the condition regarding export in the contracts concluded by those two undertakings with Schiltz?"

By order of 30 November 1983 the Court (Fourth Chamber) joined the two cases for the purposes of the oral procedure and judgment.

II — Conclusions of the parties

A — In Case 29/83

The *applicant* claims that the Court should:

1. Declare void Article 1 (1) of the Commission Decision of 14 December 1982;
2. Declare void or, at the very least, reduce the fine imposed on the applicant by Article 2 (1) of the said decision;
3. Order the Commission to pay the costs.

The *Commission of the European Communities,* the defendant, contends that the Court should:

1. Dismiss the application as unfounded;
2. Order the applicant to pay the costs.

B — In Case 30/83

The *applicant* claims that the Court should:

1. Declare void Articles 1, 2, 3, 6 and 7 of the Commission Decision of 14 December 1982, which concern the company RZ;
2. Order the Commission to pay the costs.

The *Commission of the European Communities, the defendant,* contends that the Court should:

1. Dismiss the application;
2. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. The liability of Rheinzink for the behaviour of its predecessor

The first submission — concerning a preliminary issue — made by *Rheinzink,*

the applicant in Case 30/83, is that the acts described by the Commission in its decision of 14 December 1982 were committed by its predecessor, the company RZ. The applicant considers that, as it became the successor to RZ on 1 October 1981, that is to say, before the notification of the said decision, it is only liable for the obligations of RZ which arose during that company's existence. If the Commission had imposed the fine at a date when RZ still existed, the applicant would certainly be liable as its successor. That is not so in the present case. Consequently, the applicant cannot be sued on a debt incurred in respect of a fine subsequent to the legal transformation. It adds, in its *reply,* that an undertaking which carries on the commercial activity of its predecessor cannot have the latter's behaviour imputed to it. No such principle of law exists. In that connection, the applicant refers to the judgment of the Court of 16 December 1975 (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie and Others* v *Commission of the European Communities,* [1975] ECR 1663, particularly at p. 1950 et seq.), in which it was held that the successor is only liable for the behaviour of its predecessor where there is "obvious continuity". In the present case, there is no such continuity.

In its defence, the *Commission of the European Communities, the defendant,* maintains that the acts committed by RZ are imputable to the applicant, because the two undertakings are, in competition law, two successive legal forms of one and the same undertaking. RZ has simply changed its name and its legal form, while its objects, its registered office and its management have remained unchanged. According to the Commission, the Court has accepted the principle that the successor may, even in the absence of formal legal succession, be held liable where the operation in question involves economic succession (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie and Others* v *Commission of the European Communities,* cited above). The Commission adds, in its *rejoinder,* that the applicant is putting forward an erroneous interpretation of the above-mentioned judgment. The *Suiker Unie* case concerned two distinct companies which had coexisted for a certain period of time. There being no legal succession, an additional element was considered necessary for the acts of one company to be imputed to the other, namely continuity between the companies concerned. In the present case, the applicant has continued the commercial activity of its predecessor without any modification. Under those circumstances there can be no doubt that Rheinzink is liable for the infringements committed by RZ.

2. The infringement of procedural rules

In its second submission, again on a preliminary issue, *Rheinzink, the applicant in Case 30/83,* claims that its right to a fair hearing has been infringed by the Commission inasmuch as the latter did not allow it to examine, during the administrative procedure, all the documents on which the contested decision was based.

The applicant states that it did not have knowledge of all the documents relating to the delivery agreements between CRAM and Schiltz even though CRAM's attitude is being invoked

against RZ. After notification of the contested decision, it asked the Commission to allow it to consult all the supporting documents which the Commission had used. The Commission only allowed it to consult the documents submitted by RZ itself and the correspondence between RZ and the Commission. All these documents were already known to the applicant. The Commission should have given it the opportunity to consult and evaluate the documents which it had obtained from third parties.

The *defendant* replies that this submission is manifestly unfounded. As far as CRAM's conduct is concerned, the facts on which the contested decision was based were the cessation of deliveries by CRAM to Schiltz on 21 October 1976 and the pressure put on Schiltz by CRAM, such as, in particular, the telex message from CRAM to Schiltz on 12 November 1976, calling upon the latter to cease its exports to the Federal Republic of Germany. The Commission points out that those facts were communicated to the applicant in the statement of objections. It adds that neither the cessation of deliveries by CRAM nor the contents of the aforementioned telex communication have been contested by the applicant.

3. Concerted action between CRAM and RZ

In this context, the two applicant undertakings make one and the same submission: the Commission has not produced proof of concerted action between them relating to the protection of the German market. In support of this submission, they put forward several arguments which can be summarized as follows.

(a) The arguments of CRAM

(A) The Commission was wrong to consider that CRAM had stopped deliveries to Schiltz on 20 October 1976 without any explanation. In fact, deliveries were interrupted at that date quite simply because the order to which they related, namely the order for 240 tonnes of rolled zinc products, had been entirely fulfilled. Consequently, 20 tonnes of rolled products did not remain to be delivered on 20 October 1976, as the Commission claims in its decision. Thus, the cessation of deliveries on the above-mentioned date was in no way abnormal.

(B) The Commission was wrong to suggest, in the contested decision, that there was some connection between the cessation of CRAM's deliveries to Schiltz on 20 October 1976, on the one hand, and the complaint made to Schiltz by RZ on 21 October 1976 that the former had failed to observe the clause concerning exportation to Egypt, on the other. According to CRAM, there was no relationship between those two events. Furthermore, the Commission has not proved that CRAM knew of the complaint made by RZ to Schiltz.

(C) RZ's telex communication to CRAM on 26 October 1976 in no way constitutes proof of concerted action between the two undertakings. A brief examination of the text of the said telex message will demonstrate that it had

nothing to do with the behaviour of CRAM towards Schiltz.

According to CRAM, the observations set out above demonstrate that its behaviour towards Schiltz had nothing to do with concerted action with RZ. What is more, examination of the "various signs" relied upon by the Commission in support of its complaint of concerted action shows that they do not support that complaint.

(D) The Commission was wrong in considering that CRAM awaited the outcome of the inquiries conducted by RZ in regard to Schiltz and Kestermann before demanding from Schiltz, on 8 November 1976, payment of the sums which were owed to it. In fact, on 14 October 1976, CRAM had sent a telex communication to Schiltz demanding, *inter alia*, payment of six outstanding invoices for September 1976. Schiltz responded to that telex message by promising to pay the invoices before the end of October 1976. However, on 31 October 1976, CRAM found that three of the six invoices were still outstanding. Consequently, it sent Schiltz another telex message, on 2 November, demanding payment of the sums due. What is more, Schiltz also showed itself to be unable to meet invoices relating to deliveries made between 13 and 20 October 1976 which were due for payment at the beginning of November 1976. With regard to those, it proposed to CRAM, by telex message of 9 November 1976, that it would pay one half by means of a draft and the other by means of an irrevocable credit, on condition in both cases that CRAM fulfil the two other orders of 11 October 1976. It was in response to that message that CRAM, on 12 November 1976, formally requested Schiltz to pay the eleven outstanding invoices for October without further delay. The Commission's view that there is some connection between the inquiries carried out by RZ in regard to Schiltz and Kestermann on 27 and 29 October 1976 and CRAM's formal request for payment on 12 November 1976 is thus without foundation.

(b) The arguments of Rheinzink

(A) If CRAM's cessation of deliveries to Schiltz on 21 October 1976 was due to concerted action with RZ, as the Commission claims in its decision, it is hard to understand why RZ did not immediately stop deliveries to Schiltz instead of waiting until 29 October 1976. In fact, on 26 October, RZ had received and confirmed another order made by Schiltz. The same day RZ gave instructions to fulfil that order, worth about DM 250 000. If RZ had known of Schiltz's operations from 21 October, it would have had every interest in blocking all deliveries to Schiltz.

(B) RZ's telex message to CRAM on 26 October 1976 had no connection with

CRAM's cessation of deliveries to Schiltz. The Commission was not able to establish any link between those two events. Even if the communication had no meaning "other than as part of a concerted effort to combat together parallel exports" to the German market, as the Commission puts it, that is not enough to establish a plausible connection with the behaviour towards Schiltz. In that connection, the applicant draws attention once again to the fact that RZ had, on that very day, given instructions for a large order from Schiltz to be fulfilled.

(C) RZ stopped deliveries to Schiltz because the latter had deceived it and because the re-export of goods to the Federal Republic of Germany was likely to damage it. The behaviour of RZ could thus, without difficulty, be explained solely by reference to its own interest. CRAM's cessation of deliveries on 21 October 1976 played no role in this context.

(D) The contested decision is based on the idea that a concerted practice is proved by the simple fact that two undertakings react in the same way to the same events. According to the applicant, this approach does not conform to the Court's case-law, which requires, to prove a concerted practice, "coordination", "practical cooperation" knowingly substituted for the risks of competition and "contact" between the undertakings (see, for example, judgment of 16 December 1975, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie and Others* v *Commission of the European Communities*, cited above, or judgment of 14 July 1981, Case 172/80, *Züchner* v *Bayerische Vereinsbank AG*, [1981] ECR 2021). As regards contact between CRAM and RZ, the Commission has only proved the existence of the telex message of 26 October 1976, which bears no relation to its behaviour towards Schiltz.

The result of all these considerations is that RZ did not take part in a concerted practice contrary to Article 85 (1) of the Treaty.

(c) The Commission's defence

In its reply to CRAM's observations, the *Commission of the European Communities, the defendant in both cases,* observes first of all that, in its decision, it assumed incorrectly that on 20 October 1976, the date of CRAM's last delivery to Schiltz, there remained undelivered 20 tonnes of rolled products from the order for 240 tonnes of 8 September 1976. CRAM has proved, in its application, that in reality, with the delivery of 20 October 1976, all of that order had been delivered. However, that is only a mistake of detail. CRAM has not contested that, by 20 October 1976, it had accepted the other two orders from Schiltz, namely an order for 631 tonnes for Egypt and an order of 44 tonnes for Iran, to be delivered before the end of November 1976. Those two orders were never fulfilled. As regards CRAM's cessation of deliveries on 20 October

1976, the contested decision, according to the Commission, retains its significance. Even if the order for 240 tonnes had been entirely fulfilled, there were still 675 tonnes of rolled products to be delivered. The Commission adds that the mistake in question was already contained in the statement of objections and that CRAM did not point it out either in its written reply or in the course of the hearing.

As regards RZ's telex message to CRAM on 26 October 1976, the Commission emphasizes that this is one of several factors which allowed it to conclude that a concerted practice existed between the two undertakings. It was the totality of those factors, and not each one taken in isolation, which allowed that conclusion to be reached. The Commission adds that the telex message of 26 October 1976 is interesting not only because of its contents, but also because of the confused replies which the two undertakings provided at the hearing, when invited to explain it. The transcript of the hearing shows that RZ claimed that exchanges of price information between producers were not unusual in this industry. CRAM, for its part, obvserved that, in the Federal Republic of Germany, such exchanges, without being unusual, were rather rare.

Finally, the Commission points out that it was unaware of CRAM's telex messages to Schiltz of 14 October and 2 November 1976 demanding payment of outstanding invoices. In the light of this new information, it recognizes that the statement, in the contested decision, that CRAM awaited the outcome of the inquiries conducted by RZ in regard to Schiltz and Kestermann before demanding from Schiltz, on 8 November 1976, payment of the sums which were owed to it was incorrect. The Commission adds, however, that this passage of the decision still holds good. The decision merely sought, on this point, to refute CRAM's explanation of its cessation of deliveries, which was based on the question of outstanding invoices. In this connection, CRAM's statement is not convincing, because it ignores the fact that, even after the invoices had been paid, Schiltz's two other orders of October 1976 were not fulfilled. Furthermore, CRAM's telex message to Schiltz of 12 November 1976 disclosed the real reason, which was the failure to observe the clause concerning exportation to Egypt. The attempt to explain the cessation of deliveries by reference to the invoice problem was thus doomed to failure.

In the light of the above observations, the Commission continues to argue that, in 1976, concerted action was taken by CRAM and RZ with a view to protecting the German market against parallel imports of rolled products being made by Schiltz.

In its answer to Rheinzink's statement, the Commission points out that the applicant does not contest the allegations made about its behaviour towards Schiltz. Furthermore, it once again points out that the behaviour of RZ and that of CRAM and the contents of the telex

message of 26 October 1976 can be explained only when seen against the background of concerted action between the two undertakings of the kind indicated in the decision.

In its reply, *Rheinzink, the applicant in Case 30/83,* answers that the only proof the Commission has of concerted action is the telex message of 26 October 1976. However, the defendant has not proved any connection between that telex message and the alleged concerted action to protect the German market.

In its rejoinder, *the Commission, the defendant in both cases,* reiterates that RZ and CRAM put pressure on Schiltz from 21 October 1979 to discontinue its exports to the Federal Republic of Germany. It is clear that RZ and CRAM reacted in a concerted manner from the fact that the cessation of deliveries coincided with RZ's communication to CRAM concerning the increase in its selling prices in Germany.

4. The agreement between RZ and Schiltz

Rheinzink maintains that the agreement concluded between RZ and Schiltz in 1976 does not infringe Article 85 of the Treaty. In support of that submission, it relies on three arguments which can be summarized as follows.

(A) The export to a non-member country of the rolled zinc products delivered to Schiltz was not part of the obligations which RZ imposed, by contract, on Schiltz. That condition was in fact formulated on its own initiative to obtain delivery of the goods in question at more favourable export prices. The applicant adds that RZ delivered at particularly low prices because Schiltz gave it false information. If RZ had known from the start that Schiltz would re-export the goods to the Federal Republic of Germany, it would certainly have demanded the German market price.

(B) There is thus no question of an agreement whose object or effect is to restrict competition. Restriction of competition is the object of an agreement only when the two contracting parties have decided upon such an object. That is not so in the present case. Furthermore, the agreements concluded with Schiltz did not have the effect of restricting competition, since Schiltz exported all the goods it bought from RZ to Germany.

(C) Even if, by indicating the country of destination, an agreement invariably restricts competition, the disputed agreement did not have an appreciable effect either on competition or on trade between the Member States.

In its defence, the *Commission* observes first of all that the applicant wrongly claims that Schiltz was free to sell the rolled zinc products which had been supplied to it by RZ in any country. In fact, there was a consensus between the two parties to the effect that Schiltz would export the goods to a non-member country. That consensus

emerges clearly from the text of the declarations of offer and acceptance which are attached to the application.

The Commission then states that the object of an agreement must be determined by reference to the aims objectively pursued by that agreement as they appear to an observer, in the light of the economic context in which the agreement must be applied. In the present case, the objective aim of the agreement in dispute was to compel Schiltz to sell the rolled zinc products outside the European Community and more particularly in Egypt and Iran. There is thus no need to consider whether the agreement did or did not have the effect of restricting competition.

Finally, the Commission contests the view that the agreement made with Schiltz had no appreciable effect either on competition or on trade between the Member States. It points out first of all that the circumstances which constitute a disruption of trade between the Member States do not include a requirement that there should actually be an appreciable effect. It is sufficient if an agreement is of such a nature as to be likely appreciably to affect such trade (see, for example, the judgment of the Court of 1 February 1978, Case 19/77, *Miller* v *Commission*, [1978] ECR 131). It points out in this connection that, if the agreement in question had not existed, the applicant would not have been able to sell rolled products at low prices to buyers outside the Federal Republic of Germany without undermining the higher price level in its home market. It is thus legitimate to think that trade between the Member States would have developed differently were it not for the disputed agreement.

In its reply, *Rheinzink* claims that, for the purpose of determining the object of the disputed agreement, the attitude of Schiltz, which never intended to observe the agreement, is certainly pertinent in the present case. According to the Court's case-law, it must be clear that even the party subject to the competitive restriction actually had that restriction in mind (see, for example, the judgment of the Court of 29 October 1980 in Joined Cases 209 to 215 and 218/78, *van Landewijck* v *Commission*, [1980] ECR 3125). That was never so in the present case.

In its rejoinder, the *Commission* replies that it is in flat contradiction of the general principles of civil law to consider, as the applicant does, that the intention of one of the parties to a contract can determine its purpose. Furthermore, the application of Article 85 of the Treaty to deliberate restrictions on competition would, if the applicant's view was accepted, be subject to subjective considerations arising from the decision-making process within the undertaking, a situation which by its very nature would exclude any form of verification.

5. The reciprocal assistance contract between CRAM, RZ and VM

Finally, the applicant complains that the Commission has wrongly considered the reciprocal assistance contract of 5 August 1974 to be a restriction on competition within the meaning of Article 85 (1) of the Treaty. In support of that view, it puts forward three arguments which can be summarized as follows.

(A) The applicant observes first of all that the contracting parties simply wanted to reduce the risk of not being

able to supply customers that they were obliged to supply. The contract in question was thus the basis of certain occasional deliveries by one party to another. It was a question of normal deliveries which, in the words of the Court, did not have "as such the object or effect of interfering with competition" (judgment of the Court of 25 November 1971 in Case 22/71, *Béguelin Import* v *G. L. Import Export*, [1971] ECR 949). Certainly, when a party to the contract is obliged to deliver certain quantities to another party in the event of the disruption of the latter's production, it cannot deliver the same quantities to third parties. Such an effect is, however, the normal consequence of every contract of delivery. Furthermore, the contracting parties limited the scope of the disputed contract to circumstances over which they had no control. The object of that restriction was specifically to preserve their freedom of decision as regards the quantities to be delivered to their regular domestic or foreign customers. It was not in any way a restriction on the free play of competition.

(B) Even if the contract at issue was capable of producing the effects attributed to it by the Commission, it has not caused appreciable damage either to competition or to trade between Member States. In fact, the Commission itself could only find three periods, in 1977, during which deliveries took place on the basis of the contract. Moreover, those deliveries were of limited size.

(C) Furthermore, among the disruptions noted by the Commission, two were due to strikes. The contract at issue is thus, to a large extent, an agreement to provide assistance in the event of a strike. An obligation to provide mutual assistance in such an event is quite permissible.

The Commission's defence

The Commission emphasizes first of all that the contract at issue obliges the parties to reserve for each other part of their production capacity. Such an obligation does not in itself give rise to a trading transaction. It does, however, limit the freedom of the party subject to the obligation to make use itself of its production capacity. That limitation on the parties' freedom of action has an appreciable effect on the position of third parties in the market in question. The Commission adds that, in the present case, the agreed upper limits represent more than one-third of the capacity of each of the three contracting parties. Consequently, the disputed contract has the object and effect of restricting competition within the meaning of Article 85 (1) of the Treaty.

The Commission then observes that the question whether the restriction on competition is appreciable is not to be resolved, as the applicant claims, by reference to the number and size of the deliveries actually made between the parties to the contract. The decisive factor is rather the latent unavailability of the production capacity for other uses. It is the potential importance of the disputed contract which is decisive for the purposes of Article 85 of the Treaty.

Finally, the Commission claims that the applicant has mistakenly described the disputed contract as an agreement to provide assistance in the event of a strike. The object of the contract is, according to Clause 1, a reciprocal ob-

ligation to provide emergency supplies in the case of "technical or other disruption". It applies therefore to any disruption forming part of the risks attached to the activity of the undertaking concerned.

6. The amount of the fines

CRAM maintains that, since the complaint of concerted action is unfounded, the fine should be declared void. In the alternative, it requests a sizeable reduction in the fine imposed because of the serious difficulties that the zinc industry in general and the applicant in particular is undergoing. CRAM adds that the amount of the fine is disproportinate to the length of the alleged concerted action, which only took place from 21 to 29 October 1976. The amount of the fine is therefore manifestly excessive.

Rheinzink takes the same view on this point, adding that the Commission has not even stated whether RZ acted deliberately or merely by negligence. Furthermore, it observes that Schiltz's behaviour is a mitigating circumstance which justifies a reduction of the fine imposed.

As regards CRAM, the *Commission* replies that the fine is less than 0.5% of the total turnover of that undertaking. Such a fine cannot be considered excessive, given the seriousness of the offence.

As regards Rheinzink, the *Commission* observes first of all that the amount of the fine represents less than 1.5% of that undertaking's turnover and less than 0.015% of the turnover of the international group, Metallgesellschaft, of which RZ was part at the time. The Commission has thus taken account, in spite of the seriousness of the offence involved, of the short period during which the offence was committed. The fine imposed on RZ was 25% higher than that imposed on CRAM because RZ was part of the Metallgesellschaft group, whose total turnover, which was more than DM 10 000 million in the financial year 1980/81, is greater than CRAM's. Finally, the Commission states that the contested decision is based on a finding of deliberate behaviour by RZ in its concerted action with CRAM.

In its reply, *Rheinzink* observes again that, when it was notified of the contested decision, RZ was no longer a member of the Metallgesellschaft group. Its membership of the group could therefore play no role in fixing the fine.

In its rejoinder, the *Commission* replies that RZ was a member of the Metallgesellschaft group at the time when the facts at issue took place and that that was the material time for the purpose of fixing the fine.

IV — Oral procedure

The parties presented oral argument at the sitting on 14 December 1983.

The Advocate General delivered her opinion at the sitting on 1 February 1984.

Decision

1 By applications lodged at the Court Registry on respectively 23 and 25 February 1983, the Compagnie Royale Asturienne des Mines, SA, whose registered office is in Paris, and the company Rheinzink GmbH, whose registered office is in Datteln (Federal Republic of Germany), brought actions, pursuant to the second paragraph of Article 173 of the EEC Treaty, seeking a declaration that the Commission Decision of 14 December 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.629 — Rolled zinc products and zinc alloys), which was notified to the applicants and published in the Official Journal (L 362, p. 40), is partially void.

2 The first applicant (hereinafter referred to as Asturienne) requests that Article 1 (1) and Article 2 of the contested decision be declared void. The second applicant (hereinafter referred to as "Rheinzink") requests that Article 1 (1) and (2), Article 2 and Article 3 of the decision be declared void.

3 Article 1 (1) of the decision states that the concerted action taken in 1976 by Asturienne and Rheinzink with a view to protecting the German market against parallel imports of rolled products effected by Gebr. Schiltz NV of Aartselaar, Belgium (hereinafter referred to as "Schiltz"), constitutes an infringement of Article 85 of the Treaty. Article 2 of the decision imposes fines on the two undertakings "for their involvement in the infringement referred to in Article 1 (1)".

4 Article 1 (2) of the decision states that the agreements concluded in 1976 between Asturienne and Schiltz, on the one hand, and between Rheinzink and Schiltz, on the other, requiring the latter to resell rolled zinc products in a specific country had as its object the restriction of parallel imports into the Community and therefore constituted an infringement of Article 85 of the Treaty.

5 According to Article 3 of the decision, the reciprocal assitance contract concluded on 5 August 1974 between Asturienne, Rheinzink and the Société des Mines et Fonderies de Zinc de la Vieille Montagne SA, whose registered office is in Angleur (Belgium), also constitutes an infringement of Article 85 of the Treaty.

6 Before examining the submissions contesting the existence of the alleged infringements, the preliminary submission raised by Rheinzink must be considered. According to that submission, Rheinzink is not in any event liable for the infringements found by the Commission, because these may be imputed only to the company Rheinisches Zinkwalzwerk GmbH & Co., which was dissolved in 1981, that is to say, between the dates on which the alleged behaviour took place and the moment when the Commission adopted the contested decision. Rheinzink points out that the decision refers exclusively to the company Rheinisches Zinkwalzwerk GmbH & Co.

7 Rheinzink admits that it is the sole legal successor of the dissolved company, the latter having been transformed into a limited liability company under the name Rheinzink. It refers, however, to Article 15 (2) of Regulation No 17, which allows the Commission to impose fines only on those undertakings which have committed infringements of Article 85 of the Treaty, in support of the view that the legal succession which took place could not make Rheinzink liable for the acts of another company which in the meantime had ceased to exist.

8 The Commission contends that, for the purposes of competition law, Rheinzink and Rheinisches Zinkwalzwerk GmbH & Co. are two successive legal forms of one and the same undertaking. The subjects of competition law are undertakings. The undertaking in question changed its name and its legal form at the moment of the transformation, but its objects, registered office and management remained unchanged. Consequently, the acts committed by the dissolved company may be imputed to Rheinzink as the sole legal successor of that company.

9 The Commission's argument must be accepted. Rheinzink has not contested that not only is it the legal successor of Rheinisches Zinkwalzwerk GmbH & Co., but it has continued the economic activities of that company. For the purposes of Article 85 of the Treaty, a change in the legal form and name of an undertaking does not create a new undertaking free of liability for the anti-competitive behaviour of its predecessor, when, from an economic point of view, the two are identical.

A — The concerted action

10 The concerted action taken by Asturienne and Rheinzink which is the subject of Article 1 (1) of the contested decision must, according to the preamble to the decision, be seen against the background of measures taken to protect markets by certain major producers of rolled zinc products. Those measures were prompted by the fact that, at that time, the prices charged by those producers for rolled zinc products were higher in Germany and in France than in certain other Member States, in particular Belgium, and in many non-member countries. Those price differences, which were sometimes considerable, favoured the activity of importers who bought rolled zinc products in a country where prices were low in order to resell them in a country where prices were higher, in particular in the Federal Republic of Germany. The concerted action taken by Asturienne and Rheinzink was designed to prevent such parallel imports.

11 The two applicants maintain that the Commission has not proved that they took concerted action with a view to the protection of the German market. They consider that the Commission based its decision on a number of factors; however, those factors were insufficient to make out the complaint of a concerted practice set out by the Commission and, what is more, the Commission disregarded other factors unfavourable to its case.

12 It is not disputed that during 1976 Asturienne and Rheinzink delivered large quantities of rolled zinc products to Schiltz, in Belgium, for sale in Egypt, at prices close to those charged for sales intended for the Belgian market. The rolled zinc products sent to Belgium were relabelled by Schiltz and then loaded on to lorries bound for Germany, where they were resold at prices lower than those normally charged in that country.

13 It is also agreed that this practice continued until the end of October 1976, that two employees of Rheinzink discovered, at that time, that the products delivered to Schiltz were being re-exported to Germany, and that both

Rheinzink and Asturienne discontinued their deliveries to Schiltz between 21 and 29 October 1976.

14 According to the contested decision, the cessation of deliveries to Schiltz by the two undertakings could not be explained other than by an exchange of information between them with a view to taking parallel action against Schiltz as part of a concerted practice protecting the level of prices on the German market, in particular by preventing parallel imports or the reintroduction of rolled zinc products originating in Germany.

15 In arriving at that conclusion, the decision relies on the following factors:

On 21 October 1976, the date on which Asturienne suspended its deliveries to Schiltz "for no apparent reason", Rheinzink accused Schiltz of not complying with the clause concerning exportation to Egypt. The Commission maintains that it cannot be regarded as a coincidence that those events occurred on the same date.

On 26 October 1976, Rheinzink informed Asturienne by telex message that it intended to reduce its prices on the German market by about 3%, a communication which would have been "devoid of purpose as between competitors other than as part of a concerted effort to combat together parallel exports to that market";

On 29 October 1976, Rheinzink discontinued its deliveries to Schiltz after attempting unsuccessfully to induce the latter to put an end to its exports to the Federal Republic of Germany;

Not until 8 November 1976, that is to say, after the Rheinzink employees had completed their inqiuries in regard to Schiltz and its German buyer, did Asturienne demand payment from Schiltz of the sums which were still owed to it.

16 The Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action by the two undertakings. Faced with such an argument, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the contested decision.

17 The applicants have in fact proved the existence of such circumstances. The Commission was obliged to admit that, contrary to the findings in the decision, Asturienne had completely fulfilled an order from Schiltz for 240 tonnes of rolled zinc products at the time when it ceased deliveries to it on 21 October 1976. Asturienne has also proved, by producing invoices and telex messages, that it had already had difficulties with Schiltz regarding the payment of certain invoices relating to deliveries made in September, that it had demanded payment of those invoices by telex communications of 14 October and 2 November, and that problems of the same kind had arisen over payment of the invoices relating to the 240 tonnes delivered in October, as can be seen from a telex communication of 12 November.

18 In those circumstances, the cessation of deliveries to Schiltz by Asturienne, and the moment at which that cessation tock place, can be explained by considerations arising from the financial relations between Asturienne and Schiltz.

19 The fact that on 26 October 1976 Rheinzink sent a telex communication to Asturienne concerning the reduction of prices on the German market does not, in itself, constitute evidence establishing the existence of a concerted practice, not least because the Commission has not proved or even alleged that this had an effect on the prices charged by Asturienne.

20 It follows from the foregoing that the Commission has not produced sufficiently precise and coherent proof to justify the view that the parallel behaviour of the two undertakings in question was the result of concerted action by them.

21 Consequently, the applications of the two applicants must be granted on this point, and Article 1 (1) of the contested decision must be declared void.

22 Article 2 of the decision, which imposes fines on the two undertakings solely by reason of their having committed the infringements referred to in Article 1 (1) must, as a consequence, also be declared void.

23 As a result of that declaration of nullity, it is no longer necessary to examine Rheinzink's submission concerning the non-consultation of documents relating to the cessation of deliveries to Schiltz by Asturienne.

B — The export clauses

24 The decision states, in its preamble, that the clause stipulating that Schiltz must export to Egypt the tonnages of rolled zinc products delivered by Asturienne and Rheinzink constitutes, by its very object, a restriction on competition. That clause, according to the decision, limits the freedom of the dealer to market the goods where he wishes and allows the two producers to prevent parallel imports within the common market. It thus serves to protect the German market, which is more vulnerable because of the high level of prices.

25 Rheinzink contends that the export clauses included in the contracts between it and Schiltz did not infringe Article 85 of the Treaty. It maintains first of all that the condition regarding export to a non-member country was not imposed by it but was inserted into the contracts at the initiative of Schiltz, which thereby sought to obtain the goods at more favourable export prices. It goes on to claim that an agreement can have as its object the restriction of competition, within the meaning of Article 85 of the Treaty, only if the two contracting parties have together set themselves such an objective, which is manifestly not what happened in the present case.

26 Those arguments cannot be accepted. In order to determine whether an agreement has as its object the restriction of competition, it is not necessary

to inquire which of the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common intent at the time when the agreement was concluded. It is rather a question of examining the aims pursued by the agreement as such, in the light of the economic context in which the agreement is to be applied.

27 In that connection, the decision — the findings of which have not been contested on this point — states that Schiltz's first order to Asturienne, made at the request of a German buyer, was for rolled sheets in dimensions common in Germany and that Asturienne objected that such dimensions, while widely sold in Germany and in France, were not in demand in Belgium. Following that incident, Schiltz obtained the same sheets from Asturienne and Rheinzink by leading them to believe that the sheets were to be re-exported to the Middle East and in particular to Egypt. The prices charged by the two producers were, however, almost identical to, or very close to, those which the same producers charged for their sales intended for the Belgian market.

28 In those circumstances, the conclusion cannot be avoided that the export clauses were essentially designed to prevent the re-export of the goods to the country of production so as to maintain a system of dual prices and restrict competition within the common market.

29 Rheinzink also claims that the agreement has had no appreciable effect either on competition or on trade between the Member States.

30 It does not however contest that, as far as production of zinc sheet is concerned, there are only six rolling mills of various sizes in the common market, of which Rheinzink is the only one in the Federal Republic of Germany. In that kind of market situation, it is impossible to accept the argument that a restriction of competition consisting of the isolation of the German market would not be appreciable.

31 Those considerations lead to the conclusion that the complaints made against Article 1 (2) of the decision must be rejected.

C — The reciprocal assistance contract

32 By a contract concluded on 5 August 1974, Asturienne, Rheinzink and Vieille Montagne undertook to supply each other with rolled zinc products in the event of serious disruption resulting in significant loss of production at any one of their factories, for whatever reason. According to the contract, the assistance was to be forthcoming as soon as the production shortfall of the undertaking suffering the disruption exceeded 20 tonnes per day, or a total of 200 tonnes. Each of the other parties undertook, in such cases, to effect delivery of not more than 15 000 tonnes on condition, however, that its own production was not disrupted. The contract provided that it was to be valid until 31 December 1976 and automatically renewed for successive periods of one calendar year, unless terminated, which has not happened.

33 According to the contested decision, the contract constitutes a restriction on competition by virtue of both its object and its effect. It deprives the parties of their independence of action, of their ability to adapt individually to circumstances and of the possibility of benefiting, by increasing direct sales to customers, from production stoppages or reductions in output sustained by the other undertakings. The contract could, moreover, compel the parties to supply each other with considerable tonnages. On the basis of those considerations, the decision concludes that a contract of such general scope and of such long duration, being automatically renewable any number of times, "institutionalizes mutual aid in lieu of competition" and is likely to "prevent any change" in the respective market positions.

34 Rheinzink does not contest the facts found by the decision on this point. It considers, however, that the Commission has made an incorrect assessment of the reasons for the contract and its practical consequences. The three undertakings simply wished to reduce the risk of not being able to supply their regular customers in exceptional circumstances likely to interfere with

production. The practical utility of the contract became apparent in a few exceptional cases where the contract served as a basis for occasional deliveries by one undertaking to another.

35 However a reciprocal assistance contract between producer undertakings might generally be evaluated in relation to the prohibitions contained in Article 85 of the Treaty, the terms of the contract in question are so general and indefinite that they could be put into effect in a way very different from that which the parties claim to have envisaged and which the have actually adopted until now. The undertakings to provide mutual assistance do not just relate to cases of *"force majeure"* and comparable situations, but to all cases of "serious disruption", of whatever kind and from whatever source. It thus appears that the conditions for the application of the contract are so wide and so vague as to serve as a restriction of competition. To that consideration must be added the indeterminate duration of the contract and the fact that large quantities of rolled zinc products are involved, given the uncontested figures set out in the decision.

36 The complaints directed against the findings regarding the reciprocal assistance contract cannot therefore be upheld.

37 Consequently, the provisions of Article 1 (1) and Article 2 of the contested decision must be declared void and the remainder of Rheinzink's application must be dismissed.

Costs

38 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. However, according to the first subparagraph of Article 69 (3), where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs in whole or in part.

39 In Case 29/83 the defendant, having failed in its submissions, must be ordered to pay the costs.

40 In Case 30/83 the parties, having each failed in some of their submissions, must bear their own costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. **Declares Article 1 (1) and Article 2 of Commission Decision 82/866/EEC of 14 December 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.629 — Rolled zinc products and zinc alloys — Official Journal 1982, L 362, p. 40) void;**

2. **Dismisses the remainder of the application in Case 30/83;**

3. **Orders the defendant to pay the costs in Case 29/83;**

4. **Orders the parties to bear their own costs in Case 30/83.**

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 28 March 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the Fourth Chamber