

OPINION OF MR ADVOCATE GENERAL
VERLOREN VAN THEMAAT
DELIVERED ON 26 MAY 1982¹

*Mr President,
Members of the Court,*

Introductory observations

The case on which I give my opinion today concerns once again the steel quota system introduced by Decision No 2794/80 of 31 October 1980 (Official Journal L 291 of 31 October 1980, p. 1). Since the Court is familiar with the quota system from a number of other cases and the main points of the system are set out in the report for the hearing I need not examine it further.

Under the system the applicant in these proceedings, a German steel undertaking, received an notification from the Commission dated 6 April 1981, pursuant to Article 3 of Decision No 2794/80 (see Annex 1 to the application). In the notification particulars were given of the relevant reference production figures for the second quarter of 1981 and of the production quotas resulting from the application of the abatement rates prescribed by Decision No 664/81 of 13 March 1981 (Official Journal L 69 of 14 March 1981, p. 22) and relating to that quarter. As to the reference production figures the notification simply stated that they had been adjusted in accordance with Article 4 of Decision No 2794/80. It subsequently became clear in the proceedings that the reference production figures were adjusted pursuant to Article 4 (3), that is to say by taking account on the one hand of the average rate of utilization of the applicant's hot wide-strip mill No 2 at Bremen in the period from July 1977 to June 1980 and

on the other hand the average rate of utilization of the same facilities of the other undertakings in the Community during the years 1977, 1978 and 1979. The basis taken for the figures, and I shall go into this in detail later, was the maximum possible production which in a questionnaire covering 1980 the applicant had stated to be 4 260 000 tonnes (whereas the figure given for the maximum possible production in questionnaires covering previous years was only 3 770 000 tonnes).

That decision prompted the applicant to institute proceedings before the Court on 15 May 1981. In its application it asks the Court to declare void the decision contained in the Commission's letter of 6 April 1981, in so far as it fixes the applicant's reference production figures and production quota for the rolled steel products in Group I (within the meaning of Article 2 of Decision No 2794/80).

The grounds for its application are that the Commission failed to observe the principle of uniform employment, failed to take the action required by the prohibition of subsidies contained in Article 4 (c) of the ECSC Treaty and that Decision No 2794/80 did not receive the assent of the Council. The first ground of application was framed more precisely in the reply inasmuch as it is there claimed that the Commission failed to observe "the principle of uniform minimum employment". In addition the applicant raised two further complaints in the reply (which naturally raises questions of admissibility): it contends that delivery quotas were fixed

¹ — Translated from the German.

for the common market and exports and that this was not permissible.

In my view the legal dispute described above calls for the following comments.

I — Breach of the alleged requirement of uniform minimum employment

Quite apart from the question whether a requirement of uniform minimum employment can be deduced from the ECSC Treaty, a number of different aspects should be distinguished. The applicant's complaint is directed on the one hand against Decision No 2794/80 and on the other hand against the way in which Article 4 (3) of Decision No 2794/80 was applied to the applicant's case. An appropriate distinction must be accordingly drawn when this complaint is considered from the legal point of view.

As for the contention that the requirement of minimum uniform employment has general validity as far as the application of Article 58 is concerned, I will merely say at this stage that in my opinion such a requirement cannot at any rate be deduced simply from the provisions concerning a compensation fund, as is contended in the application. In Decision No 2794/80 no use was in fact made of this possibility, mentioned in Article 58 (2), of maintaining employment in particularly badly affected undertakings and in these circumstances I consider that only the narrower obligation "to safeguard continuity of employment" contained in Article 2 applies in this regard. Even if considered together with the general legal principle of equal

treatment no requirement of *uniform* minimum employment can be deduced from the obligation contained in Article 2 for according to the wording of Article 58 the Community must also take account of the aims of economic policy, mentioned in Article 2, of ensuring "the most rational distribution of production at the highest possible level of productivity". Those aims of economic policy may perfectly well exclude the maintenance of uniform minimum employment in the steel undertakings of the Community.

1. *Criticism of the structure and content of Decision No 2794/80*

(a) First of all, the precise object and scope of this criticism must be determined. This seems particularly necessary in view of the arguments contained in the application which at first sight might be understood as separate complaints about the structure and content of Article 4 (3) of Decision No 2794/80. I have in mind the reference to the fact that under Article 4 (3) a different *reference period* from that generally used to determine reference production figures is applied for the purpose of determining an undertaking's average rate of utilization of its production capacity to which the provision is applied. I also have in mind the point that the reference period just mentioned is not the same as the reference period on the basis of which the average rate of utilization of the same facilities of the other undertakings is determined and finally the point that Article 4 (3) of Decision No 2794/80 only provides for an upward adjustment of the reference production figures to a level which corresponds to a rate of utilization which lies five percentage points below that average rate in the other undertakings.

However, it became clear during the proceedings and particularly after the questions put by the Court had been answered that those points are not meant to be separate complaints. Instead they are merely intended to show in which way Decision No 2794/80 offends against the requirement of minimum employment, as understood by the applicant; we may therefore spare ourselves the task of examining the question whether those points, if intended as complaints, have sufficient foundation. When it speaks of a breach of the requirement of minimum employment what the applicant really has in mind is merely the *absence* from Decision No 2794/80 of a provision increasing the production quota to a minimum level, determined according to each undertaking's present capacity and the average rate of utilization of all undertakings calculated from the decreased reference production figures.

Furthermore it may at first sight appear that the applicant merely wishes the rate of utilization of its *mill No 2* to be raised to the average level in the Community. The applicant originally operated with that capacity and contends that it is 459 000 tonnes a month, not just 355 000 tonnes a month, which the Commission believes to be the correct figure. This issue is therefore also material as regards the application of Article 4 (3) to the specific case. It is now clear, however, following the answer to a question which I asked at the hearing, that the applicant believes that the capacity of its *mill No 1*, closed down since April 1974, which amounts to 169 000 tonnes a month ought to be taken into account in this regard. It believes that it should be taken into account because the mill was shut down pursuant to a restructuring measure promoted by the Commission

and after an initial running-in period could easily be brought into operation again and because at the end of 1980 the applicant did intend to report this capacity to the Commission.

The legal aspects of the first part of the first ground of application must therefore be examined in that light.

(b) As I mentioned in my introductory remarks on this ground of application, the applicant mainly relies on Article 58 (2) of the ECSC Treaty to support its argument that regard should have been had in the quota system to the principle that a minimum level of utilization ought to be maintained.

That provision states that the level of activity of undertakings may be regulated by means of levies on tonnages exceeding a reference level set by a general decision. It also states that the funds thus obtained are to be used to support undertakings whose rate of production has fallen below that envisaged "in order, in particular, to *maintain employment* in these undertakings as far as possible". In the applicant's view that last aim must be regarded as the focal point of Article 58 as a whole, not only, therefore, where a system of levies is concerned but also where production is regulated directly by quotas. In accordance with the basic orientation of the ECSC Treaty, which is expressed in a series of its provisions (Articles 3 (e), 46, 56, 67, 68 and 69) and which is towards the achievement of

social justice, it must also be assumed that the aforesaid aim, which may also be discerned in Article 2, takes precedence over other aims of the Treaty. Seen in that light the Commission's primary obligation when restrictions of production become necessary is to spread the sacrifices of jobs evenly among undertakings and to ensure that a uniform level of employment is maintained. Leaving aside the issue of subsidies which must be dealt with in another context, it may not depart from that obligation except for *one* purpose, namely to favour undertakings which have closed down facilities in connection with desired restructuring measures. This was the case with the applicant because in April 1974 it temporarily shut down its mill No 1. To take into account such undertakings' actual production alone must be regarded as incompatible with the aims of Article 58. It is therefore necessary to make *employment* the guiding principle of the quota system and this necessarily entails the obligation to prevent undertakings' utilization of their actual capacity from falling below a certain minimum level.

(c) The Commission contests the validity of that argument with a number of objections which are summarized in the report for the hearing. As is apparent from my introductory remarks on this ground of application, I, too, consider the applicant's arguments in this regard to be unconvincing.

(aa) The Commission's general contention, which my colleague Mr Advocate General Reischl also discussed

in his opinion in Case 14/81¹, is that it has *wide discretion* in elaborating the quota system. It argues that the matter is one of the "evaluation of the situation resulting from economic facts or circumstances" within the meaning of Article 33 of the ECSC Treaty. But if under Article 33 only complaints that the Commission has misused its powers or manifestly failed to observe the provisions of the Treaty are admissible this means that when a quota system is reviewed by the Court all the latter may do is to verify whether the Commission has kept within the outermost limits of the discretion accorded to it.

The discretion, which as I have mentioned is accorded to the Commission, can hardly be ignored and consequently this must be borne in mind as a fundamental factor in the present context. I have already pointed out that the Commission has the power but not the duty to introduce the levy system mentioned in Article 58 and that it is hardly proper to draw, from the existence of that power, inferences relating to a situation, such as those in this case, where in the exercise of its discretion the Commission does *not* use that power.

(bb) It must also be remembered that the problem of using production capacity as a criterion for the quota system has been significant in a number of other cases. Mr Advocate General Reischl expressed doubts in his opinions in Cases 258/80² and 14/81. I myself in my opinion in Joined Cases 39, 43, 85 and

1 — *Alcoa Steel Limited v Commission*, judgment of 3 March 1982 [1982] ECR 749.

2 — *S.A. Metallurgica Rumina v Commission*, judgment of 16 February 1982 [1982] ECR 487.

88/81¹ have pointed out the doubts which, from the point of view of the aims pursued by the quota system, arise here from considerations relating to the market economy as regards the need to encourage a reduction of capacity and from the fact that less efficient undertakings might be put at an advantage if capacity alone is taken into account. In its judgments in those joined cases and in Case 14/81 the Court accordingly held that the Commission is free to choose the basis upon which quotas are determined and actual production must be considered an appropriate criterion because it avoids the uncertainties involved in using capacity as a criterion and enables production to be reduced without altering undertakings' positions on the market.

takings will therefore be jeopardized, a factor which must not be forgotten, especially in this context.

These considerations alone doubtless suffice to refute the applicant's argument, even if, as it maintains, undertakings' production capacity should not be the *main* criterion but simply be used to *rectify* production quotas which in principle are determined according to actual production.

(cc) Moreover — and this is the most important point of all — as I mentioned in my introductory remarks, the principle put forward by the applicant is not in fact to be found in the Treaty.

This case indeed illustrates the problems which arise in the determination of capacity and its utilization, particularly if statements of previous maximum possible production are compared with the corresponding actual production. Furthermore the applicant's argument plainly implies a redistribution of production and in some cases a considerable change in market positions which depends on many factors, for example the type of product and the adaptation of production in good time. For if under the general programme for adjusting production to the decline in demand an undertaking is allocated above-average quotas based on its production capacity then if the aim pursued is to be achieved other undertakings' quotas will need to be reduced and in some cases jobs in other under-

There is certainly no hint of it in *Article 2*, which requires *inter alia* "continuity of employment" to be "safeguarded", or in *Article 3 (e)*, which mentions improved working conditions and an improved standard of living for workers. If, in spite of the generality of the phrases used, it is sought to deduce from those provisions the requirement that when production is restricted the necessary sacrifices should be spread evenly among workers, then it hardly seems incompatible with that requirement (precisely because in general the number of jobs depends not on an undertaking's capacity but on its actual production) for the emphasis to be on actual production and for care to be taken to ensure that it is reduced uniformly, which prevents individual undertakings from suffering a dispro-

¹ — *Halyvourgi Inc. and Helieniki Halyvourgia S.A.*, judgment of 16 February 1982 (1982) ECR 593

portionately large fall in production and the consequential effects on the labour force.

But, as I have already mentioned, *Article 58* itself is also incapable of substantiating the existence of the principle postulated by the applicant. In particular, I have already observed that it is hardly possible to deduce from a system, which is not prescribed, and which the Commission in the exercise of its discretion does not apply, principles governing a system which the Commission actually does apply. In so far as the second sentence of *Article 58 (2)* provides for the regulation of the level of activity of undertakings and the fixing of a reference level for production it is clear too that as regards the levy system it is indeed supposed that rates of utilization vary and therefore that a minimum rate of utilization cannot be guaranteed. Another important point is that employment must be maintained, by means of compensation payments, only "*as far as possible*" and, in the case of the desired production restrictions, nothing else seems possible.

In view of this it might possibly be thought that this guiding principle should also be given effect in a system of production quotas. In this regard it may be assumed that the lower the rate of an undertaking's utilization of its capacity the greater the risk to jobs. To my mind that view expressed by the applicant cannot really be disputed given the fact that the burden of overhead costs becomes greater when the level of activity falls. In other words it must be recognized that it is necessary to ensure

in the elaboration of the quota system that where there is already an *unusually low rate of utilization of capacity* this must be taken into account in one way or another. Yet it is plain that this is precisely the function of the adjustment rule contained in *Article 4 (3)* according to which a rate of utilization which is below the average must be taken into consideration and, provided certain conditions are fulfilled, the reference production figures must be raised to a level which corresponds to a rate of utilization which lies five percentage points below that average rate in the other undertakings. (I shall shortly return to that rule.)

If that is borne in mind it may hardly be said that in elaborating *Decision No 2794/80* the Commission totally overlooked the problem of employment and thus entirely neglected an important aim of the Treaty. On the other hand it is not possible to challenge the basic correctness of the Commission's approach of applying *restrictive* criteria in the formulation of the adjustment rule because the adjustment rules result in *notional* reference production figures. At all events I am not convinced that it is possible to contend that the provisions of the Treaty cited by the applicant demand much less emphasis on actual production and that the failure to introduce rules of the kind which the applicant believes to be necessary (basically increasing production capacity to the average level in the Community, irrespective of the reasons for which the utilization of capacity was below the average in the past) should be regarded as a misuse of powers in the sense which I described at the outset. As I observed earlier, the Commission must also have regard in particular to the aims of economic policy mentioned in *Article 2* of the ECSC Treaty.

To my mind it is plain, moreover, that the reference made at the hearing to Article 14 (b) of the quota rules now in force (Decision No 1831/81 of 24 June 1981 (Official Journal L 180 of 1: 7, 1981, p. 1) as amended by Decision No 533/82 of 3 March 1982 (Official Journal L 65 of 9. 3. 1982, p. 6) does not require a different conclusion to be reached because the new provision is simply an equitable rule for smaller undertakings and not, on the other hand, a reflection and thus a recognition of the principle asserted by the applicant.

(dd) If that is accepted, namely that the Commission was not in fact under a duty to ensure that all undertakings have a uniform minimum level of utilization, there is no need to examine the question of the correct figures to be taken for the applicant's *present* capacity (as we know, the applicant gives a figure of 459 000 tonnes a month for its mill No 2, which the Commission disputes); nor is there any need at this stage to examine the question whether mill No 1, which the applicant shut down in 1974, ought to have been taken into account. Those and other related questions can only be dealt with in the review of the specific decision adopted in this particular case.

2. *The allegedly incorrect application of Article 4 (3) of Decision No 2794/80 to the applicant's case*

(a) At the beginning of this opinion I mentioned that the Commission increased the applicant's reference production figures in accordance with

Article 4 (3) of Decision No 2794/80. As the Court is aware, that provision, which has also played a significant part in other cases, stipulates that where the average rate of utilization of an undertaking's production facilities was ten percentage points or more below the average rate of utilization of the same facilities of the other undertakings of the Community during the years 1977, 1978 and 1979 the reference production figures are to be increased to a level which corresponds to a rate of utilization which lies five percentage points below that average rate in the other undertakings (provided that certain conditions, in particular compliance with a delivery programme as established by the Commission, of no further interest here, are fulfilled).

In the proceedings the Commission described to us how that provision was applied in particular to the applicant undertaking, or to be more precise, to its mill No 2 in Bremen. Of decisive importance in this regard was Questionnaire 2-61 which the applicant and other undertakings must complete each year as part of their obligation under Article 14 of Decision No 22-66 (Official Journal, English Special Edition 1965-1966, p. 280) to furnish information about their investments and which defines actual production and maximum possible production. From the explanatory notes on the questionnaire it is clear that maximum possible production does not consist of, for example, the theoretical technical capacity but is an order of magnitude which is determined according to the production conditions and initial section conditions prevailing in each undertaking and which therefore also depends on the capacity of preceding plant and the purchase of metal, the production structure (composition of the production programme in accordance with the pattern of demand) and the capacity of

following plant. For a number of years, namely in the questionnaires covering the years 1977, 1978 and 1979, the applicant accordingly estimated the maximum possible production of its mill No 2 at 3 770 000 tonnes (314 000 tonnes a month). It was not until 1 January 1980, the date on which its next questionnaire had to be submitted, that without any explanation it gave in that document a higher tonnage, namely 4 260 000 tonnes (355 000 tonnes a month). Consequently a verification was carried out by means of a performance test in May 1980 after which the officers of the Commission accepted the applicant's new figure despite the fact that the test showed that the maximum possible production was only 4 230 000 tonnes. By a letter of 11 December 1980 the Commission accordingly rectified its first decision of 1 November 1980 in the applicant's case in which it had at first raised the reference production figures for the fourth quarter of 1980 on the basis of 314 000 tonnes a month. Moreover in the next two quarters the Commission applied Article 4 (3) of Decision No 2794/80 on the basis of a maximum possible production for the applicant of 355 000 tonnes a month.

(b) Nevertheless the applicant considers that the adjustment to the reference production figures which is arrived at in this way is not sufficient and also complains on that point, too, in the first ground of application. In its view it simply should not be bound by figures which it had once reported as "a matter of routine" without precise verification at a time when its level of activity was very low and it could not be aware of the importance which one day they would assume under a quota system. The applicant contends that the correct figure for its capacity should now be used instead, namely the figure of 5 508 000 tonnes (or 459 000 a month) which it gave in the questionnaire submitted on 1

January 1981 and which was also the figure for the previous years. The applicant argues that on that basis it is clear that its rate of utilization was considerably lower than the Commission assumed, hence the need for a greater increase in its reference production figures which would also result in a higher rate of utilization for the second quarter of 1981.

(c) On that argument, which the Commission has emphatically disputed, I consider the following comments should be made.

(aa) First of all it is necessary to point out that from the applicant's written argument it was not quite clear whether it also complains that its *mill No 1* in Bremen with a capacity of 169 000 tonnes a month was not taken into account in the examination of the question of the utilization of capacity. Given the applicant's answer to a question put to it at the hearing we now know that it definitely takes the view that mill No 1 and its capacity ought to have been taken into account when Article 4 (3) of Decision No 2794/80 was applied.

This point of the applicant's argument obviously cannot be accepted. If under Article 4 (3) it is an undertaking's average rate of utilization in the period from July 1977 to June 1980 which is the crucial factor, that is to say a comparison of actual production with maximum possible production, then presumably only facilities which were at least partly in operation in that period can be considered and not those, such as the applicant's *mill No 1*, which owing to the construction of a bigger and a more up-to-date mill was closed down and moth-

balled in 1974 and about which it cannot be said for certain even now whether it will ever be used again.

(bb) Furthermore, the fact that the question of utilization is dealt with on the basis of *maximum annual production possible within the meaning of Questionnaire 2-61* and that in this regard the Commission mainly relies on *reports* made by the undertakings themselves is in my view quite unobjectionable.

It is important to realize that Article 4 (3) of Decision No 2794/80 plays a part in the context of restrictions of production undertaken with a view to adjustment to a changed *market situation*. In view of that the obvious and appropriate course was not to proceed on the basis of the theoretical concept of technical capacity but to select a yardstick which most closely reflects actual production. It is equally evident that the Commission relied mainly on the information supplied by the undertakings for reasons of practicability. It was not conceivable that given a quota system which was planned to be in force for a period of nine months and had to be implemented very quickly the Commission should at great administrative expense carry out time-consuming *ad hoc* inquiries into the capacity and actual utilization of a large number of undertakings. This is so quite apart from the fact that it would be so extraordinarily difficult, if not impossible, to obtain in retrospect a reliable picture of undertakings' maximum possible production within the meaning of Questionnaire 2-61, which depends on all kinds of specific circumstances.

(cc) Yet the information supplied in the questionnaires must certainly not be assumed to be absolutely binding in the sense that subsequent corrections are ruled out. The applicant contends that Article 47 of the ECSC Treaty provides for penalties for false statements irrespective of the reasons for which they were made. It would however be unreasonable to introduce *additional penalties*, so to speak, through the incorrect fixing of production quotas which could in certain circumstances, if one proceeds on the basis of the calculations made by the applicant, entail a considerable disadvantage. The question whether this argument is wholly convincing and whether the Commission is not entitled in principle to act on the basis of the figures of the undertakings concerned without this being regarded as an additional penalty can remain open. For it is clear that the Commission, too, has not ruled out the possibility of corrections. What is more, the Commission did in fact, as I mentioned, allow a correction to be made to the figures for the applicant's maximum possible production and afterwards altered the very first notification of the applicant's quota, which was for the fourth quarter of 1980.

(dd) So the question in this case comes down to whether the applicant was right to demand *an even more substantial correction* of the figure determined for its production capacity in 1977, 1978 and 1979. This raises in the first place the question whether any kind of time-limit must apply to such a demand and secondly the question whether the applicant was in fact able to adduce sufficiently firm evidence showing that even the Commission's altered figures for its capacity did not reflect the true situation in the reference period.

As to the first point, the view may certainly be taken that strict requirements had to apply in this regard, the reason being that the quota system was created only for the duration of nine months because the restrictions of production were meant to correspond to the decline in demand and an increase in the quota of one or more undertakings must have an effect on the system as a whole, at any rate in a later quarter. Therefore any need to correct quotas had to be pointed out quickly and detailed, conclusive evidence furnished.

It is, however, difficult to accept that the applicant's conduct met those requirements. It is important to remember that it was apparent as early as the adoption of the quota system in October 1980 that for the purposes of Article 4 (3) utilization of capacity was the decisive factor. It is also important to remember that the Commission proceeded on the basis of a certain *corrected* maximum possible production figure for the applicant as regards the fourth quarter of 1980 (it did the same for the first two quarters of 1981). However, the applicant's response was merely to submit a new capacity report on 1 January 1981 without giving any reason for it; a detailed explanation supported by technical experts' reports was not provided, however, until May 1981 when these proceedings were instituted. The applicant must in fact admit that its objections to the conduct of the performance test carried out at short notice and allegedly without time for preparation in May 1980 ought to have been made immediately. (It complains that the rolling programme carried out differed from normal conditions in various respects — a high proportion of thick metal, impossibility of composing the metal into convenient rolling lots and

unusually large difference in thickness of the slabs.) The normal production conditions prevailing in May 1980 were not, however, those which mattered; consideration ought to have been given to what the rolling mill undergoing the test was capable of producing under the production conditions prevailing in 1977, 1978 and 1980.

If the reservations which I have just expressed are put aside and the view taken that the applicant must still be entitled to show at a later date that the Commission's figures for its mill No 2 were incorrect, there are still the following comments to be made on the question whether *sufficiently firm evidence* of the need to re-assess that capacity was adduced:

The applicant mainly relies on an expert's report of the Japanese Kawasaki Steel Corporation of May 1981 which was apparently prepared pursuant to an agreement between the applicant, the Commission and the German authorities as well as for the purposes of any market system which might be planned after expiry of the quota system. Admittedly it cannot be said of that report, as the Commission does, that it merely proves *theoretical* assumptions about the maximum utilization of the plant. For the applicant stresses that it provided the experts with technical and operational data on the mill, the sizes of the slabs and coils and on its production programme so that they were definitely in a position to proceed on the basis of the specific production conditions at Bremen. However, the Commission

rightly objects that, given the fact that the production programme may vary from month to month, it has not been demonstrated that the experts took a whole year's production programme as the basis for their report. With regard to the fact that the capacity was calculated for five modes of operation which varied according to the product mix and additional precautions the Commission further objects that the applicant has not demonstrated why the mode of operation which results in the figure which it uses (namely 487 000 tonnes a month) should be the one to be taken into account. The Commission also points out that in the experts' 'conclusions' it is stated that this figure was determined on the basis of the information provided by the applicant on *inter alia* the capacity of its walking beam-type furnaces and that it represents the figure up to which output *might* be raised.

Secondly, considering that the applicant, which has stressed that the technical structure of the mill, which was completed in 1972, has not changed since 1977 (conversion to other sources of energy having been carried out before then), also had to admit that since then certain changes have taken place (alteration of the length of the slabs, increased use of heat), and bearing in mind that in an article on mill No 2 published in the periodical *Stahl und Eisen* in 1977 the applicant's technical director stated that it had a capacity of 310 000 tonnes a month although it was possible, in particular after further enlargement of the walking beam-type furnaces, to achieve 450 000 to 500 000 tonnes a month in the *output* stage, then there really seems to be no justification for regarding the Kawasaki report as

containing any significant evidence proving that during the entire period of 1977 to 1980 the applicant's maximum possible production with mill No 2 had always been of the order which it declared at the beginning of 1981.

In so far as the applicant further refers to an *expert's report of 12 January 1982* which it submitted together with its answers to the Court's questions and which concerns a walking beam-type furnace's capacity on which the capacity of mill No 2 depends (according to the report the capacity of the furnace was considerably higher than the figure quoted by the applicant itself and the figures which Kawasaki took as a basis for its report), it should be said that even if the report is to be regarded as constituting documentary evidence, there must be serious doubt in view of Article 42 of the Rules of Procedure whether it may be admitted as evidence after the written procedure has closed. Article 42 provides that as a rule evidence must be tendered in the application and defence and any subsequent indication of evidence must be justified. In that regard, the Commission's point that the test carried out for the purposes of the report lasted only 90 minutes and its objection based on a letter from the president of the Belgian Institute, the *Centre des Recherches Métallurgiques*, that permanent capacity cannot be proved by such tests certainly cannot be ignored. Nor should it be forgotten that the report is based on tests which took place in December 1981 and January 1982; therefore it is at best an indication of the applicant's present situation in various modes of operation but it does not prove that such output had always been possible in 1977, 1978 and 1980 under the range of production in operation at that time.

(d) In those circumstances the conclusion to be drawn with regard to the second part of the first ground of application can only be an adverse one as far as the applicant is concerned. Even supposing that a correction of capacity figures for the years 1977, 1978 and 1980 may be demanded at a time when the quota system has already been applied for six months (I should point out that the Commission took the view that evidence of the maximum possible production in 1977, 1978 and 1980 may no longer be adduced at all), then at least it must be concluded that the evidence adduced by the applicant provides no compelling grounds for describing the figures used by the Commission as incorrect. Therefore to declare the contested decision void on the ground of infringement of Article 4 (3) of Decision No 2794/80 is certainly not justified.

production capacity (which did in fact increase by about 10% from 1974 to 1976). It contends that contrary to its duty, defined in Article 8 of the ECSC Treaty, the Commission took no action against this flagrant breach of the principle contained in Article 2 of the Treaty and of the prohibition of subsidies the vital importance of which has been repeatedly stressed in case-law of the Court and that it is also now doubtless no longer possible to undo what has happened. In view of the fact that by virtue of this, the conditions of production were improperly influenced during the reference period which is relevant for Decision No 2794/80, it cannot be considered justifiable to base the quota system simply on *actual* production in those years. It would have been more equitable, the applicant argues, to take account of these matters in the assessment of quotas as a kind of compensation for damage and either reduce the quotas of undertakings receiving aids, which would have produced less without them, or grant a quota increase to undertakings which had not received subsidies.

II — Failure to take into account breaches of the prohibition of subsidies contained in Article 4 (c) of the ECSC Treaty

In its second ground of application the applicant points out that for many years and, to judge from reports in the press, especially since 1975, considerable sums from public funds have been allocated to national steel industries in a number of Member States (namely Belgium, France, Italy and the United Kingdom) and this has not only led to a distortion of the conditions of competition but has also artificially preserved and increased

The Commission does not deny that since the beginning of the steel crisis considerable aid has been given to the steel industry in some Member States. Nevertheless the Commission questions the details provided by the applicant on the extent of the aid provided. Secondly it contends that the aids in question were not all granted *specifically to the steel industry* and were not all covered by Article 4 (c) but partly took the form of general measures in the sphere of economic, industrial, regional, fiscal and social policy as well as the promotion of research (adopted, incidentally, also in the Federal Republic of Germany) which are not prohibited under the Treaty but come instead under Article 67 which

merely lays down a procedure for eliminating the effects which they have on the steel industry. Thirdly, and above all, the Commission maintains that, even in so far as the aids in question were not compatible with Article 4 (c), in the absence of express authority under Article 58 it did not have the power to incorporate compensatory provisions in the quota system (which would have meant, first, acceptance and approval of the subsidies and secondly, with reference to the applicant's argument that some form of compensation for damage ought to have been introduced, the penalization of the *undertakings* receiving the subsidies instead of the Member States responsible for providing them). According to the Commission it may properly deal with such infringements of the Treaty only in proceedings under Article 88 which also provides special guarantees for the Member States concerned.

As far as this issue is concerned, it is quite understandable that non-subsidized undertakings like the applicant are severely critical of the Commission's conduct and the form which the quota system took. It is quite clear that the quota system, which is primarily based on *actual* production in the past, would have produced different results if in the past the Commission had put an end to prohibited subsidies, thus preventing unviable undertakings from being artificially kept alive in whole or in part or production from being increased, which would not have been possible without subsidies.

It also strikes me that the Commission goes too far in arguing that subsidies

granted in breach of the ECSC Treaty can only be the subject of proceedings instituted under Article 88 of that Treaty (which deals with the recording and *remedying* of a failure to fulfil an obligation under the Treaty) whilst outside that context they cannot constitute a material circumstance. After all, Article 58 does provide that the principles set out in Articles 2, 3 and 4 should be taken into account and indeed no distinction is made as to whom those provisions are primarily addressed. Article 54 of the ECSC Treaty, dealing with the Commission's opinion on investment programmes, must also be borne in mind. The fifth paragraph of that article expressly provides that where the financing of a programme or the operations of the installations planned therein would involve subsidies, aids and the like an adverse opinion delivered by the Commission on those grounds is to have the force of a decision within the meaning of Article 14 and the effect of prohibiting the undertaking concerned from drawing on resources other than its own funds to carry out the programme to which objection is taken. At the very least this means that where aids are concerned, and at all events before the aids are granted, the Commission can take some action against undertakings without starting proceedings under Article 88. Furthermore it is certainly not inconceivable that the grant of subsidies might be an important factor as regards Decision No 2794/80 itself, for example in the application of Article 4 (4) or, in some circumstances, in the application of Article 14.

Finally, I see no reason for suggesting that on the question whether previous subsidies should be taken into account the Court should depart from its decision in Case 14/81 in which it was held with regard to a similar, though less elaborate, argument that Article 58 is not

designed to compensate for distortions of competition attributable to subsidies, for which the Commission has other means of action at its disposal (paragraph 23). However, it seems to me that in view of the Commission's arguments on this matter, which, as I have said, go too far, that paragraph of the Court's judgment should be clarified and expanded.

as they apply, rule out an infringement of Article 4, do not remedy what has happened in the past (because, as results from Article 1 of the decisions, they only apply to aids granted after their entry into force and previous subsidies are required to be taken into account only in accordance with Article 2 of Decision No 2320/81 in the examination of new plans for aids).

Since the Commission has, as I have said, a considerable margin of discretion in elaborating the quota system, the crucial question in this context, too, is, as it was in Case 14/81, whether the failure to take account of subsidies in the reference period must be viewed as a *misuse of powers*. For various reasons that question can hardly be answered in the affirmative. As a general proposition it may be said that, although Article 58 of the ECSC Treaty does require the Commission to have regard to the prohibition of subsidies contained in Article 4 when it fixes quotas, it does not stipulate how this is to be done.

In this regard it must first be remembered that the Commission has already attempted in Decision No 257/80 of 1 February 1980 (Official Journal L 29 of 6. 2. 1980, p. 5) to tackle the problem of specific aids to the iron and steel industry and that these efforts were continued on a wider basis in Decision No 2320/81 of 7 August 1981 (Official Journal L 228 of 13. 8. 1981, p. 14). It certainly ought not to be forgotten that those rules, which, so far

However, it seems extremely questionable whether the Commission, either in a decision or when applying Article 88 of the Treaty or calculating reference production in the past, may still reconsider circumstances dating back a number of years in order to neutralize payments made at that time or their effects on reference production. Any such application of the obligation contained in Article 58 to have regard to the prohibition of aids would not only encounter legal objections but would be opposed by considerations of practicability. In fact it is difficult to see how that duty could reasonably have been fulfilled without carrying out protracted inquiries under the quota system which had to be worked out and put into practice very quickly. In particular there would be the problem of calculating any allowances and decreases according to the subsidies granted and their effects on the conditions of production. It is also not difficult to see that any attempt to achieve a solution (even by using estimates as in the law of damages, to which the applicant referred) would have produced protracted and extensive disputes making the quota system, which is capable of functioning only if clear conditions of production are provided, for the most part impracticable. Given that situation,

it would scarcely be proper to impose on recipients of subsidies, which have acquired certain legal rights, commensurate penalties in the form of a reduction in their quota accorded under the quota system.

In my view, therefore, the fact that the Commission generally disregarded the question of unlawful aids granted in the past cannot be regarded as a defect of the quota system which would be a ground for declaring void the contested notification.

A different question, however, is how far the question, upon which I have already touched, of the subsidizing of competitors may be taken into account in the context of, for example, Article 4 (4) or Article 14 of Decision No 2794/80. Although no submission to that effect has been made in this case I think that it would be appropriate, in view of the clear contradiction between the obligation in Article 58 to take account, when fixing quotas, of Article 4 of the ECSC Treaty and the Commission's argument that in that regard the prohibition of aids cannot be taken into consideration at all, for the Court to make some mention of that obligation in its judgment. As I have said, in the context of Decision No 2794/80/ECSC that obligation could be taken into account both in the application of Article 4 (4) and, in certain circumstances, in the application of Article 14. To my mind it would be quite possible to contemplate a future provision, modelled on the fifth paragraph of Article 54 of the ECSC Treaty, to the effect that, for example, no quota may be allocated for production which has arisen or been maintained in contravention of Decision

No 2320/81 of 7 August 1981 (Official Journal L 228 of 13. 8. 1981). Just as Article 54 gives the Commission the power, if not the duty, to deliver an adverse opinion on an investment programme if prohibited aids are used, it may be said that the duty in Article 58 (2) to take account, when fixing quotas, of the prohibition of aids at least entitles the Commission to refuse quotas where such aids are used.

III — Lack of the Council of Ministers' assent to Decision No 2794/80

1. Article 58 of the ECSC Treaty provides that if the Commission considers that the Community is confronted with a period of manifest crisis, it is, after consulting the Consultative Committee and with the *assent of the Council*, to establish a system of production quotas. As far as this requirement is concerned the applicant does not deny, if my understanding is correct, that the Council of Ministers dealt with this problem at its sitting on 30 October 1980 and also voted in favour of the quota system. Moreover, any other view would be difficult to comprehend in view of the statement in the recitals in the preamble to Decision No 2794/80 to the effect that the Council had given its assent and the press release on 30 October 1980 by the General Secretariat of the Council announcing this and also explaining which unsettled problems were discussed at the Council meeting (namely those concerning fine and special steels and the determination of the products which would not be included in the quota

system). However, the applicant does not consider this sufficient (as the Court is aware, it argues that at its meeting the Council discussed only the question whether production quotas should be introduced at all, whether exceptions should be made for special steels and what shares should be allocated to each Member State). In the applicant's opinion the ECSC Treaty required the assent of the Council of Ministers to a *detailed draft decision*. However, no such assent was given because no such draft was submitted and the Council was not informed verbally of the details of the quota system. Moreover, the established fact that the Council and thus the governments of the Member States considered such a course of procedure to be proper does not cure that defect. It merely shows that the Council itself has no proper understanding of Article 58 and its responsibilities under that article. In actual fact that provision does not allow the Council to give the Commission *general authority* to work out the details of the quota system as it thinks fit. As such a system affects employment and cannot be effectively integrated by the Commission, which is not politically tied to those holding power in the Member States, into the political life of the Member States, it needs the political support of the individual governments also, and indeed particularly, as far as its details are concerned.

In reply to that argument the Commission takes the view in its defence first that under Article 58 the assent of the Council of Ministers is required only on the question *whether* a quota system

should be introduced; in particular paragraph (2) makes it clear that the details of the system are for the Commission to work out. In support of that view it points out that the structure of the ECSC Treaty is fundamentally different from that of the EEC Treaty. It emerges in particular from Article 14 that as a rule the Commission adopts the necessary legal instruments whilst according to Article 26 the Council is involved in the process of the formulation of objectives only "in order to harmonize the action of the High Authority and that of the governments, which are responsible for the general economic policies of their countries", which undoubtedly does not require it to exert influence over every detail of a scheme. The Commission also believes that an argument in support of its view may be derived from the second subparagraph of Article 58 (1). It argues that since according to that provision the Council may, acting unanimously, require a quota system to be introduced it must be assumed that the Council is not thereby made responsible for all its details; on the other hand, however, it is also difficult to imagine that in such a case the assent of (the majority of) the Council to the details of a quota system is once more required. Yet, if my understanding is correct, in its rejoinder the Commission has somewhat modified its view. In any event it there argues that the Council must give its assent to the *material terms* of a quota system which subsequently, in a further stage of the procedure, is put into the form of a decision by the Commission. As evidence also of the fact that the Council was in fact sufficiently involved in the adoption of the quota system, in other words that the *basic material terms* of the quota system did receive its assent, the Commission points to a comparison between the proposal which it made to the Council on 6 October 1980 and the terms of the decision which was subsequently adopted.

2. As far as the resolution of this further issue in the proceedings is concerned, it is to be noted first that very considerable, albeit not wholly unequivocal, assistance is to be found in *academic writing*.

On the one hand Kovar (in *Le Pouvoir Réglementaire de la Communauté Européenne du Charbon et de l'Acier* 1964, p. 174) takes the view that where the ECSC Treaty provides for a "avis conforme" [assent] of the Council of Ministers it is not sufficient for the main aspects of the relevant question to be submitted to the Council; instead, a draft decision must be presented to the Council and its assent must relate to that draft.

On the other hand there are more numerous proponents of the theory that under Article 58 the assent of the Council is required only on the question of the necessity to introduce a quota system, that is to say on the question whether the conditions prescribed by Article 58 (manifest crisis) obtain, and is not needed on the other hand for the specific details of the system which are left to be worked out in practice by the High Authority (see, for example, Mertens de Wilmars in *Les Nouvelles, Droit des Communautés Européennes* published by Ganshof van der Meersch 1969, p. 520; Quadri, Monaco, Trabucchi, *Trattato Istitutivo della Comunità Europea del Carbone e dell'Acciaio* 1970, Note 3 on Article 58; Erichsen, *Das Verhältnis von Hoher Behörde und Besonderem Ministerrat nach dem Vertrage über die Gründung der Europäischen Gemeinschaft für Kohle und Stahl*, 1966, p. 115). In support of that theory it is pointed out in particular that under Article 58 a distinction must be drawn between various stages in the application of that provision and that the Council's participation is envisaged only in one of them. Erichsen also points out that the

Council has no administrative apparatus divided into specialized sections according to subject-matter and therefore cannot procure the information needed to fix the quotas or carry out the necessary investigations.

3. If the various arguments put forward in the proceedings are then examined it becomes clear fairly soon that some of the considerations put forward by the applicant in support of its case as well as some of those adduced by the Commission are not particularly convincing.

(a) To begin with the *applicant's line of argument*, this is undoubtedly true of its reference to the Council's powers in the enactment of secondary Community law under the EEC Treaty in which the Council plays the main role, so to speak. That argument is of no assistance because the ECSC Treaty is clearly structured differently. Under that Treaty the Commission plainly bears the main responsibility for the drawing up of secondary Community law, which in view of the detailed form which the ECSC Treaty takes is less important in any case.

Similarly, the applicant's reference to German administrative law, according to which on the adoption of so called "mitwirkungsbedürftige Verwaltungsakte" [administrative acts requiring participation] assent is required to be given to fully-drafted legal instruments, provides no more assistance than its reference to German constitutional law under which, in so far as laws passed by the Bundestag need the assent of the Bundesrat, it is not sufficient for assent to be given to general intentions but it is presumed that a fully-drafted legal instrument exists. The Commission argued first that, quite apart from the fact that those brief references, obviously to German law alone, are not likely to be

of any assistance in identifying the outlines of a specific legal principle which also applies in Community law, there can certainly be no question of assent being given to every detail of a scheme if by administrative acts requiring participation the requirement for certain citizens to make a request is meant. Secondly, the Commission has rightly emphasized that as regards Articles 77 and 78 of the German Basic Law [Grundgesetz] it should not be forgotten that when the Bundesrat becomes involved in the legislative procedure laid down thereunder a decision approving a legislative text is already definitely in existence whereas the participation of the Council of Ministers under Article 58 plainly relates to planned measures.

Moreover, the applicant proceeds from the idea that the participation of the Council serves to strengthen the legitimacy of the Community's legal decisions. It believes that such legitimacy — in the sociological sense (inasmuch as the persons concerned are more prepared to accept official measures) — is not sufficiently guaranteed if the main responsibility for taking action lies with the Commission which is subject to only very limited parliamentary control. As regards that argument the applicant must acknowledge not only that it is difficult to see how the participation of representatives of the governments in the Council (who after all have only *indirect* democratic legitimacy) is to have the effect which it describes: it is also important to remember that, should that effect actually exist, it is sufficiently guaranteed by the participation of the Council in the determination of the *main features* of a scheme, that is without giving its assent to every single detail.

(b) Secondly, a similar view may be taken of some of the *considerations which*

the Commission has put forward to interpret Article 58.

I am thinking here of its reference to Article 14 of the ECSC Treaty from which the Commission says it may be inferred that it has a central role in the establishment of the secondary law of the Community. Nevertheless it should not be forgotten that Article 14 also contains the phrase "in accordance with the provisions of this Treaty", thereby referring to other provisions of the Treaty. Accordingly only an analysis of those provisions — in this case of Article 58 itself — can wholly show the extent to which other institutions must participate in the adoption of a decision.

I would add that it is difficult to prove by reference to the *second subparagraph* of Article 58 (1) that the Council's participation is limited to its giving its assent in principle to the introduction of a quota system. Just as on the application of that provision (under which the Council, acting unanimously, may direct that a quota system be introduced) further consideration of paragraph (1) as regards the consultation of the Consultative Committee appears absolutely essential, it may be entirely reasonable to consider that in addition to the Council's decision on the introduction in principle of a quota system, which must be adopted unanimously, a different form of assent of the Council, as provided for in paragraph (1), to the main details of the system is indispensable. Finally, the wording of the first subparagraph of Article 58 (1) supports that view and militates against too narrow a definition of the requirement of assent laid down in that provision, for the reference to the introduction of a "system" justifies consideration of the basic features of the scheme besides the question "whether" as a matter of principle it should be introduced.

4. On the other hand the decisions of the Court on the equalization of scrap, to which the Commission has referred, and also the second paragraph of Article 58, provide valuable guidance for a proper solution to the present question.

In the judgment in Case 111/63¹ it was made clear that the assent of the Council (which under Article 53 must be given unanimously to any financial arrangements) is not necessary for every alteration of any such arrangement as far as only secondary aspects such as, in that case, the rules governing interest are concerned. From that it may in fact be deduced that where the Council is required to participate by giving its assent this concerns only basic matters or the essential features of a scheme and therefore it may readily be assumed, and I say this with reference to a specific objection of the applicant, that it is indeed possible, though perhaps difficult, to distinguish between major and secondary aspects of a scheme.

Article 58 (2) states that the High Authority (now the Commission) is to fix quotas on an equitable basis taking account of the principles set out in Articles 2, 3 and 4 and after carrying out the studies made jointly with undertakings and associations of undertakings (which are not mentioned in paragraph (1)). That can only be taken to indicate a degree of independence on the part of the Commission in the elaboration of the quota system and as evidence that the Council, whose assent is mentioned in the previous paragraphs, does not need to approve every single detail of the system.

On the other hand the purpose of the requirement of assent may be best grasped by considering the general description of the powers of the Council contained in Article 26 of the Treaty according to which their purpose is above all to harmonize the action of the High Authority and that of the governments which are responsible for the general economic policies of their countries. It may be deduced from that provision as well that it is sufficient for the Council to give its assent to the basic structure and *essential features* of the system.

If that criterion is applied, however, it is clear that there can be no question of a procedural defect, on the ground of inadequate assent of the Council, in the adoption of the quota system. That conclusion may moreover be reached without acceding to the applicant's demand that the minutes of the Council meeting in question should be ordered to be produced so that it may be determined exactly to what the Council assented, and, in particular, which amendments were required of the Commission's original scheme and which amendments were made or added by the Commission on its own initiative. It is important to remember in particular that the basis for the formation of the Council's intention was a Commission proposal of 6 October 1980 which has been adduced in evidence in other court proceedings. It plainly sets out all the important points of the quota scheme (such as products covered by the system, determination of the reference period, fixing of the quotas — if necessary taking into account restructuring measures — the abatement rates foreseeable for the first quarter, regulation of deliveries within the common market, exchange and sale of quotas, verifications and penalties required and the

¹ — *Lemmerz-Werke GmbH v High Authority of the ECSC*, judgment of 13 July 1965 [1965] ECR 677 at p. 699.

start and end of the quota system). It is moreover significant in my opinion, in the sense of being at least an important piece of circumstantial evidence, that after the decision was adopted none of the Member States, some of which keep a very critical watch on the observance by the Commission of the limits of its powers, expressed any criticism or took the view that Decision No 2794/80 deviated on some important point from what the Council had decided.

Decision No 2794/80 cannot be declared inapplicable for infringement of essential procedural requirements and accordingly the directly contested notification cannot be declared void.

IV — Unlawful fixing of delivery quotas for the common market and unlawful restriction of production intended for export

Finally I come to a last series of complaints which, as I said at the beginning, were raised for the first time in the reply. One of them relates to Article 7 (2) of Decision No 2794/80 which reads:

"With regard to the delivery of products subject to the quota system, undertakings may not exceed, by group of products, for deliveries within the common market, the ratio of Community deliveries to total deliveries in those 12 months of the period from July 1977 to June 1980 in which the total production of the four groups of rolled products was the highest."

The applicant sees in this provision the fixing of *delivery quotas* which was not

within the Commission's powers under Article 58. The other complaint is to the effect that the quota scheme improperly relates to that part of production which is intended for export. It contends that exports were thereby restricted, in other words export delivery quotas were fixed because as regards this channel of disposal, apart from stocks and bought-in steel, only that part of (restricted) production which had not been marketed in the Community could be exported. In this respect, too, the applicant considers that the Commission lacked the requisite powers; what it ought to have done was restrict production according to home demand and leave products intended for export out of the scheme.

1. As I have already indicated, these arguments give rise in the first place to a number of *questions of admissibility*.

The first question is whether the objection that Article 7 (2) of Decision No 2794/80 is illegal may properly be raised in connection with the challenge to a decision which merely fixes production quotas. The second question concerns the admissibility of arguments which were not contained in the application.

(a) On the first point I can be fairly brief. The question has already arisen in the same way in two other cases (Joined Cases 275/80 and 24/81 and Case 258/80¹). Subsequent to the opinion of

¹ — *Krupp Stahl AG v Commission*, judgment of 28 October 1981 [1981] ECR 2489; *SpA Metallurgica Rumi v Commission*, judgment of 16 February 1982 [1982] ECR 487.

the Advocate General it was emphasized in those judgments that where an implementing decision is challenged objections to a general decision are admissible only if the general provision is applied in the contested individual decision, if the individual decision is based on the general provision and its legality depends on the general provision. As far as the notification of the production quotas and Article 7 (2) were concerned, such objections were rejected on the ground that the notification did not in fact fix delivery quotas and Article 7 (2) is also applicable without an individual decision.

In my opinion the same determination should also be made here, especially since the applicant itself has stated that the *delivery quotas* applying to it *were based* on the notification of the production quotas (and not the other way around). Moreover, it should not be overlooked that in the application the Court is only asked to declare the notification of 6 April 1981 void in so far as it fixes the applicant's reference production figures and production quotas for the rolled steel products in Group I; in other words the application does not refer to an instruction, also implicitly contained in the notification (because it results from the notification in conjunction with Article 7 (2)), as to the part of permitted production which the applicant could dispose of on the common market.

It must therefore be concluded in line with the Commission's view, that because a direct challenge on the basis of an allegation of a misuse of powers made pursuant to the second subparagraph of Article 33 of the ECSC Treaty has not been raised the applicant cannot raise

objections to Article 7 (2) of Decision No 2794/80 until after a decision imposing sanctions has been adopted.

(b) As regards the second point, which, in view of what has just been said, is material only for the purposes of the argument relating to the *restriction of exports*, reference must be made to Article 42 (2) of the Rules of Procedure of the Court according to which no fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure. Since that is not the case here, the principle according to which grounds of application not adduced until the reply is submitted and not even mentioned in the application are not admissible would appear in fact to come into play (that principle was mentioned in for instance, Cases 9/55¹, 18/57², in Joined Cases 27, 28 and 29/58³, Joined Cases 19, 21/60 and 2, 3/61⁴, 17 and 20/61⁵ and in Case 12/79⁶).

Admittedly that conclusion may not be free from doubt first because the complaint with which we are now concerned is based on an infringement of

1 — *Société des Charbonnages de Beeringen and Others v. High Authority*, judgment of 29 November 1956 [1956] ECR 311 at p. 326.

2 — *I. Nold KG, Kohlen- und Baustoffgroßhandlung v. High Authority*, judgment of 25 March 1959 [1959] ECR 41 at p. 51.

3 — *Compagnie des Hauts Fourneaux et Fonderies de Gisors and Others v. High Authority*, judgment of 12 May 1962 [1962] ECR 241 at p. 256.

4 — *Société Fives, Luxe Cast and Others v. High Authority*, judgment of 15 December 1961 [1961] ECR 281 at p. 295.

5 — *Klöckner-Werke AG and Hoefer AG v. High Authority*, judgment of 13 July 1962 [1962] ECR 325 at p. 347.

6 — *Hans-Otto Wagner GmbH Agrarhandel KG v. Commission*, judgment of 12 December 1979 [1979] ECR 3657 at p. 3675.

Article 58 and a number of complaints to that effect are already contained in the application. Secondly, an analysis of the relevant decisions of the Court shows that the principle just mentioned varies from case to case and that it is not always applied with the same degree of strictness. For example, arguments adduced at a later stage were not considered inadmissible if they were arguments in support of submissions already made in the application (see for example the judgments in Cases 2/54¹, 2/57² and 18/60³). It is also noticeable that in this context the attitude adopted was not always as strict as that taken in Case 18/57, joined Cases 19, 21/60 and 2, 3/61 or in the recent Case 11/81⁴. Without going into the details of the arguments, I am thinking here in particular of the situations which were discussed in Cases 2/56⁵ and 19/58⁶.

argument as to the restriction of export opportunities as inadmissible.

2. If that is accepted, it in any event becomes very quickly apparent that this complaint, too, cannot help the application to succeed.

(a) First of all, reference may be made to the judgment in Case 276/80⁷, in which the same question was raised. In that case the Court resolved the question by explaining that the Commission had been prepared to have recourse to Article 14 of Decision No 2794/80 if undertakings' export opportunities were reduced by the quota system and by pointing out that the applicant had not proved that the quota system had caused it to lose foreign markets.

Moreover, since in Case 18/57 the Court considered that it should examine *of its own motion* the submission of insufficiency of reasons, which was to be regarded as having been made out of time, there may in fact be some hesitation in this case in contemplating a strict application of Article 42 of the Rules of Procedure and instead it may be considered justifiable not to regard the

In these proceedings the Commission has explained once again that in the second quarter of 1981 it drew attention, as it had done on previous occasions, to the fact that undertakings particularly interested in exporting could obtain a higher production quota on the basis of Article 14 of Decision No 2794/80. We were also told that the applicant did not submit an application to that effect for the second quarter of 1981 because it considered it futile and its application for the first quarter of 1981 based on Article 14 was not granted because it was solely concerned with the question of the utilization of capacity. Moreover, since the applicant has not shown in these proceedings that it was actually pre-

1 — *Government of the Italian Republic v High Authority*, judgment of 21 December 1954 (1954 to 1956) ECR 37 at p. 51.

2 — *Compagnie des Hauts Fourneaux de Chasse v High Authority*, judgment of 13 June 1958 (1957 and 1958) ECR 199 at p. 226.

3 — *Louis Worms v High Authority*, judgment of 12 July 1962 (1962) ECR 195 at p. 223.

4 — *Anton Durecek v Commission*, judgment of 1 April 1982 (1982) ECR 1231.

5 — *Geitling v High Authority*, judgment of 22 March 1957 (1957 and 1958) ECR 3 at p. 17.

6 — *Government of the Federal Republic of Germany v High Authority*, judgment of 10 May 1960 (1960) ECR 225 at p. 239.

7 — *Ferrera Padana S.p.A. v Commission*, judgment of 16 February 1982 (1982) ECR 317.

vented from exporting (the Court will recall that at the hearing the applicant was expressly asked whether it had been compelled to refuse export orders), this question can in fact be decided no differently than in Case 276/80.

(b) In so far as the applicant in this case also complains that the Commission *did not state the reasons* for which it appeared to it to be necessary to extend Decision No 2794/80 to cover all exports, two further considerations provide an equally ready answer to that complaint.

It is important to remember first that from the recitals in the preamble to the decision it is plain that there is a world-wide crisis because demand is declining

everywhere. It is thus made clear that the repercussions which the quota system has on export opportunities may be entirely justified. Secondly, it is however above all clear that a production quota system, as applied here, must by its nature affect export opportunities and that existing export prospects can be taken into account only in individual cases by means of a special provision like Article 14 of the decision in question. Therefore justification for the quota system is automatically a sufficient justification for the effects which it may have on exports.

3. It is therefore clear the new submission which the applicant makes in the reply is also incapable of assisting its case.

V — Conclusion

It only remains for me to sum up. In my opinion the application lodged by Klöckner must be dismissed as unfounded and accordingly the applicant must be ordered to pay the costs.