other undertakings. That is true even if both the wording of the favourable opinion and the procedure which led to its adoption could give the impression that what was being delivered was an 'authorization'.

2. Article 58 of the Treaty does not require the Commission to guarantee to any one undertaking, to the detriment of other undertakings in the Community, the minimum production which that undertaking considers necessary in accordance with its own criteria of profitability and development.

3. The method for sharing out production quotas under Decision No 234/84 is based on the actual production of each undertaking during a reference period. There are no reasonable grounds for denying that the Commission's choice of that criterion may constitute an equitable basis within the meaning of Article 58 of the ECSC Treaty inasmuch as it constitutes an objective basis of assessment and enables total production to be reduced without altering the position of undertakings on the market as between each other. It would be totally contrary to that criterion, which seeks to share the quotas equitably between all the undertakings in the Community, having regard to the situation in the common market as a whole, to grant adjustment of those quotas in favour of a particular undertaking on the basis of the situation on its national market alone, and to seek to reserve for that undertaking the production of the steel consumed on that market.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 11 June 1985 *

Mr President,
Members of the Court,

A. The two cases before the Court today, which were joined for the purposes of the oral procedure and the judgment by an order of 28 November 1984, deal once again with problems relating to the system of steel production quotas, which, in its various versions, has engaged the attention of the Court on numerous occasions.

For the purposes of these proceedings, it should be mentioned that the first Decision governing those production quotas (No 2794/80 of 31 October 1980, Official Journal 1980, L 291, p. 1) provided for an adjustment of reference production where new plant was activated after 1 July 1980 (Article 4 (4)). I would refer the Court to the provision itself for details of the conditions governing such an adjustment. Article 13 of the first Decision extending the quota system (No 1831/81 of 24 June 1981, Official Journal 1981, L 180, p. 1), as amended by Decision No 1832/81 of 3 July 1981 (Official Journal 1981, L 184, p. 1), also contains such a provision, though in an amended form, the essence of which is that appropriate adjustments of reference production are possible in cases in which

* Translated from the German.

new rolling mills or new processing lines have been brought into service after a certain date. The subsequent decision, No 1696/82 of 30 June 1982 (Official Journal 1982, L 191, p. 1), which came into force on 1 July 1982 and, after being extended by Decision No 1809/83, remained in force until the end of July 1983, contained similar adjustment provision. Article 15 of that Decision provides as follows:

'In the context of a restructuring programme complying with the following conditions:

it must conform to the general objectives,

as regards planned investment which has been duly reported, the Commission has not delivered an unfavourable opinion or, as regards investment not subject to compulsory notification, the Commission considers that such an opinion would not have been delivered,

as regards aids granted, the latter must be in accordance with Decision No 2320/81/ ECSC,

the following rules shall apply:

(1) Where undertakings wish to arrange exchanges or transfers of reference production and quantities, the Commission may authorize such exchange or transfer if the plant related to the transferred reference production is at the same time permanently closed.

(2) Where an undertaking requests a modification of its reference production to take account of the internal reorganization of its plant, the Commission may:

— in the case of a permanent closure of such plant, reallocate to the undertaking an equivalent production reference from other product categories of the quota system providing that this does not disturb the proper functioning of the quota system . . . ,

— in the case of the commissioning of new rolling mills or processing lines after 1 July 1982 or for category IV after 1 January 1981, providing that this does not disturb the proper functioning of the system, authorize a modification of the production references of the above undertaking if the latter has made an application to this effect in the month following the commissioning of the plant in question or, if the commissioning took place before 1 July 1982, before 31 July 1982.

. . . '

However, Decision No 2177/83 of 28 July 1983 (Official Journal 1983, L 208, p. 1), which followed upon the abovementioned Decision and was in force until the end of January 1984, no longer made provision for such a possibility and the same was true of Decision No 234/84 (Official Journal 1984, L 29, p. 1) of 31 January 1984, which came into force on 1 February 1984 and governs the quota system until December 1985.

An undertaking controlled by the applicant in these proceedings, Italsider, notified the Commission on 16 May 1979 of an investment programme in accordance with the terms of Decision No 22/66 of 16 November 1966 on information to be furnished by undertakings about their investments (Official Journal, English Special Edition 1965-66, p. 280). That programme provided *inter alia* for the construction of a wide strip mill in Bagnoli, which was to have a capacity of 1 million tonnes a year and to be brought into service in July 1982.

When it came to consider that plan, the Commission apparently was at first reluctant to deliver a positive opinion under the fourth paragraph of Article 54 of the ECSC Treaty. Such an opinion was delivered only after Italsider's representatives (in the

context *inter alia* of an application for a loan under Article 54 of the ECSC Treaty) provided certain explanations during negotiations with representatives of the Commission on 12 May 1980. Those explanations made clear that the wide strip mill would, after completion of the construction work (expected to occur in December 1982) and after trials, be brought into service in the period leading up to August 1983. It was also stated that, in view of the Commission's fear that there would be an imbalance between supply and demand in respect of coils in 1983, the maximum annual production for 1983 would be 65 000 tonnes and would grow to 715 000 tonnes in 1984, 835 000 tonnes in 1985 and would finally reach 1 million tonnes in 1986. Moreover, certain closures and conversions were to be carried out as a contribution to the restructuring of the steel industry.

The Commission delivered its opinion on 31 May 1980. It reads as follows (I quote it in full because it is of fundamental importance for the case):

'The Commission refers to the investment programme for the Bagnoli works, which envisages the construction of two continuous casting installations for blooms and slabs, a hot- rolled wide strip mill, certain modifications to beam mill 920 BK and closure of two sandwich mills and the wire-rod mill at Bagnoli.

With regard to the continuous casting plant and the modernization of the beam mill, the Commission confirms that those investments are in accordance with its steel policy.

As far as the coil plant is concerned, the Commission has duly taken account of the inspections carried out by the mixed working group and of the conclusions which it arrived at, particularly with reference to whether the investments are economically justified, having regard to the objective of eventually making the undertakings competitive.

Moreover, the closures and reductions in capacity of existing installations which you have announced, namely:

the reduction in the capacity of beam mill 920 BK,

the decision not to build a new medium-sized installation,

the closure of two sandwich mills,

the closure of the wire-rod mill,

the reduction in capacity of the hot-rolled narrow strip mill,

the reduction in the capacity of the coil mill at Cornigliano,

contribute to the efforts being made to restructure the steel industry in the Community.

With regard to coils, however, discussions took place between your representatives and those of the Commission on account of the problems connected with the imbalance between supply and demand anticipated by the 1983 revised general objectives for steel. Those discussions terminated on 12 May 1980 with an agreement to postpone the investments which were to be made for the purpose of commencing the industrial production of coils and an agreement on supervision of the undertakings which you have given.

In the light of those undertakings, the Commission is in a position to express a favourable opinion on the realization of those investments.'

Subsequently, the installations in Bagnoli were built (though it appears that their capacity was larger than had been originally planned) and they were brought into service according to plan.

As I have already mentioned, there no longer existed the possibility under Decision No 234/84 — of obtaining an adjustment of

reference production on the ground that new installations had been brought into service. The applicant regards that as a serious defect in the rules currently governing the quota system and it therefore applied to the Court on 7 March 1984. In that application, registered as Case 63/84, it asks the Court to:

— Declare unlawful Commission Decision No 234/84/ECSC in so far as it prevents the applicant — in spite of the assurances which it had been given — from obtaining an adjustment of its reference production for the bringing into operation of the new wide-strip mill at Bagnoli;

— Declare void the second indent of the first paragraph of Article 14 and the fourth indent of Article 14A (4) of Decision No 234/84/ECSC;

— Adopt any other measure which the Court considers necessary, including measures under Article 34 of the ECSC Treaty.

In a letter addressed to the Vice-President of the Commission on 7 June 1983, the applicant asked that Finsider should be granted additional quotas which would allow it to achieve a more reasonable position in 1984 and 1985; in particular, it asked the Commission to grant the Nuova Italsider company an additional 1.2 million tonnes in quotas for rolled products. It repeated that request on 3 December 1983, on which occasion it stressed the need to introduce a provision similar to the former Article 15 (2) which would have allowed additional quotas to be granted in respect of the Bagnoli plant. On 2 February 1984, it wrote once again to the Commission. In that letter, it stated that if the mill in Bagnoli had been brought into service as originally planned the application of Article 15 (2) of Decision No 1696/82 could have been requested. It therefore sought additional quotas based on an average annual production of 1.2 million tonnes, on the ground that the Commission could not, because of the principle of legitimate expectation and independently of the aforementioned provision, refuse to grant such quotas. On 18 April 1984, the Commission rejected that application. In the statement of reasons for its decision it pointed out that Decision No 234/84 did not permit the adjustment of quotas sought by the applicant and it contended that the applicant was not entitled to rely on the principle of legitimate expectation in this connection.

That gave rise to a further application (Case 147/84) lodged on 12 June 1984. In that application the Court was asked to:

— Declare unlawful the decision of 18 April 1984 and Decision No 234/84 (in so far as the latter does not provide for the possibility of obtaining an adjustment of the reference quantities for the bringing into operation of the new wide-strip mill at Bagnoli);

— Annul the contested individual decision;

and

— Declare that the Commission is required to compensate the applicant for the losses sustained by it as a result of the contested decisions.

B. My opinion on these applications, which the Commission considers should be dismissed, is as follows:

I — Before going into the various arguments advanced in support of the claims, let me make a few **preliminary remarks.**

1. It appears that the grounds of the two applications are generally similar since the applicant merely relies on the arguments

advanced in Case 63/84 in order to justify its claim that the Commission's refusal to grant additional quotas in its letter of 18 April 1984 was unlawful. Both cases can therefore largely be dealt with together and it will only be necessary to make particular reference to the third claim in the first case (adoption of any other measures considered necessary) and to the claim for damages in the second case.

2. In the written procedure the applicant complained *inter alia* of the fact that the application of the adjustment provisions in Articles 14 and 14A of Decision No 234/84 (as can be seen from the first indent of the first paragraph of Article 14 and the fourth indent of Article 14A (4)) is conditional upon the undertaking in question not having received any *aids* authorized by the Commission with a view to covering its operating losses (which provision had already been introduced into the rules governing the quota system by Decision No 2748/83, Official Journal 1983, L 269, p. 55). In that regard, it advanced the same arguments in Case 250/83, [1] which also dealt with Decision No 2748/83.

However, in reply to a question from the Judge-Rapporteur, the applicant explained at the hearing that that complaint was no longer valid as a result of the judgment in Case 250/83, in which the applicant's argument was rejected. That part of the case can therefore be regarded as settled and nothing more need be said about it.

3. With regard to the first submission (breach of the principle of legitimate expectation inasmuch as Decision No 234/84 contains no provision permitting an adjustment of quotas in respect of new installations), the Commission contends *inter alia* that even if Decision No 234/84 contained a provision similar to Article 15 of Decision No 1696/82, it would have been of no value to the applicant. It simply did not meet the conditions laid down therein and it must therefore be held that it has no interest to defend by seeking a declaration that Decision No 234/84 is void by reason of the absence of such a provision.

I do not wish to comment now on all the relevant details. I would simply mention that, according to the view expressed by the Commission during the written procedure, the restructuring programmes drawn up by applicant in 1981 and 1983 were not consonant with the 'General Objectives for Steel' (because they did not provide for a sufficient reduction in capacity). I would also mention that the Commission expressed doubts as to whether a positive opinion under Article 54 of the ECSC Treaty would have been expressed in respect of the applicant's investment programme, in the form in which it was carried out. The capacity of the mill, originally fixed at 1 million tonnes a year, was increased to 2.4 million tonnes without the Commission being informed, as was required by the applicable rules. It is however questionable whether that increase was compatible with the 'General Objectives' and, for that reason, the Commission was only prepared to agree to an increase in capacity to 1.2 million tonnes a year. Finally, I would like to mention that in the Commission's view, the aids which the applicant received did not comply with Decision No 2320/81 (Official Journal 1981, L 228, p. 14) and for that reason, two actions for breaches of the Treaty were brought, in 1983 and 1984.

A considerable dispute developed on this point, with the applicant defending its position by referring *inter alia* to a new

1 — Judgment of 15 January 1985 in Case 250/83 *Finsider* v *Commission* [1985] ECR 142.

restructuring plan of 19 April 1984, valid for the years 1984 to 1986, and claiming that the capacity of the Bagnoli plant was altered with the approval of the Commission. With regard to the lawfulness of the aids it received, it referred to a letter dated 19 April 1984 from the Italian Minister for Foreign Affairs.

At the end of the oral procedure — matters having further developed in the mean time as a result of various contacts — it no longer seemed profitable to go into that problem in any greater depth. We heard that at the end of 1984 the Commission reached agreement with the applicant regarding the 'freezing' and closing of certain installations at Bagnoli. We also heard that the actions for breach of the Treaty, commenced as a result of the aids paid to the applicant, had been stayed because further aids for Finsider had been approved on condition that there was a further reduction in capacity. Finally, we heard that a new restructuring plan involving aids and closures was under discussion and that a solution regarding those aids and closures could be expected within the next few weeks.

It thus appears that it would be difficult to say that, even if there still was a provision similar to Article 15 of Decision No 1696/82, the applicant would be completely ineligible for the benefit of that provision by reason of its not satisfying the conditions laid down therein. There is therefore no question of dismissing the claim on the ground that the conditions laid down in Article 15 of Decision No 1696/82 are not satisfied.

4. As the Court will be aware, the Commission also takes the view that, even if Article 15 had remained in force, the applicant would still have no legitimate interest in bringing the proceedings, irrespective of the conditions laid down therein, because it could not have counted on being granted additional quotas since that provision, as can be seen from the use of the word 'may' and the condition that the quota system must not be disturbed, grants the Commission a discretion. The Commission observes that in the course of administering the system it has developed a number of implementing rules (additional quotas are granted only for Category Id; the reference production of installations which have been closed down is the primary source of quotas for new installations) and in the light of those rules it would be difficult to grant the applicant an increase in reference production by reason of the Bagnoli plant's being brought into service.

On this point too I have difficulty in agreeing with the Commission.

The question which must be pursued is not so much how far there have been departures from the principle that adjustments are only granted for Category Id (as the Court is aware, the Commission justifies such departures in the case of a Greek cold-rolling mill by referring to the special circumstances existing in Greece) or whether Article 15 has not in some cases been applied without corresponding closures (as was done for the Galvalange company, in respect of which the Commission gave a detailed explanation in its rejoinder). What is more important is that additional quotas under Article 15 appear to be granted when the reference production of installations which have been closed down is not sufficient to provide adequate work for new plants and that the Commission concedes in the present case that the applicant might have obtained a *small* quota for Bagnoli in addition to the quotas in respect of closure of the rolling mill in Cornigliano. Secondly, and above all, it is important to note that the applicant is not merely seeking an

extension of the rules laid down in Article 15 of Decision No 1696/82. If I have correctly understood its argument, it reasons beyond the principle of the protection of legitimate expectation to the necessity of including in Decision No 234/84 rules permitting it to obtain in all circumstances such additional quotas as are necessary to permit satisfactory operation of the Bagnoli plant.

The action cannot therefore be dismissed on the ground that the applicant has no legitimate interest in pursuing its claim and we therefore have no choice but to examine in detail the arguments advanced by the applicant in order to see whether they genuinely reveal the serious defect in Decision No 234/84 which the applicant claims exists.

II — The submissions advanced in both applications in support of the main claims

1. *Breach of the principle of the protection of legitimate expectation*

(a) In support of this claim the applicant has pointed out that the rolling mill in Bagnoli had been approved and partly financed by the Commission and could have been brought into service in July 1982 (that is to say, at a time when the possibility of an adjustment of reference production under Decision No 1696/82 still existed). The fact that its entry into service was postponed at the request of the Commission imposes a corresponding liability upon the Commission. In any event, had the applicant suspected that acceding to the Commission's request would have created such difficulties, it would never have done so. The applicant also claims that the terms of the legislation governing quotas gave rise to a legitimate expectation inasmuch as the possibility of obtaining adjustments in respect of new installations had always existed. The Commission, wrongly, failed to take account of all the consequences flowing from the absence of a provision permitting an adjustment of quotas in Decision No 234/84. At the very least, it should have adopted transitional rules for the protection of undertakings which were unable to obtain adjustments of their quotas because they had postponed bringing new installations into service at the request of the Commission.

In reply to those arguments, the Commission refers principally to the special nature of an opinion delivered under Article 54 of the ECSC Treaty, which has no legal effect and merely provides clarification of overall perspectives and general guidelines which the Commission will follow in the exercise of its powers. Moreover, it is of the opinion that, irrespective of that consideration, the conditions laid down by the Court for the application of the principle of the protection of legitimate expectation are not satisfied in this case. There is no question of any legitimate expectation that the Commission would maintain in force the provision regarding adjustments contained in Article 15 of Decision No 1696/82. One might even say that its abolition was foreseeable because the conditions for the application of the adjustment provisions were continually being made more strict. It must also be recognized that because of the deepening crisis in regard to hot-rolled products, an overriding public interest required that the provision in question should be repealed, if the Commission's efforts to achieve a drastic reduction in production were not to be partially frustrated.

(b) The following observations must first be made with regard to this issue:

(aa) It is certainly wrong to speak, as the applicant does, of its Bagnoli installation being *approved* by the Commission. The Commission merely delivered an *opinion* on

the applicant's plan, as provided for in Article 54 of the ECSC Treaty, the terms of which I quoted at the beginning of my opinion. The Court has already held in a previous decision [2] that an opinion cannot directly involve the person to whom it is addressed in any legal obligation. It is merely a means by which the Commission discharges its responsibility to give guidance and is therefore merely advice given to undertakings, who remain free to heed or ignore it. It was expressly emphasized that the freedom of decision and the responsibility of the undertakings remained, like those of the High Authority, unchanged.

(bb) In so far as the applicant claims that if it had known that it would not be able to obtain an adjustment of its reference production later it would have brought the Bagnoli plant into operation in 1982 (while it could still avail itself of the possibility of an adjustment under Article 15 of Decision No 1696/82), it must accept that this would obviously not have been decisive. An important condition for the application of Article 15 of Decision No 1696/82 (absence of a negative opinion) would have been lacking, since the Commission had expressly stated in its opinion that the plant was not to be brought into operation before 1983. The fact that such a condition was laid down in the context of the Commission's obligation to give such general guidance as seemed at the time to be appropriate does not, however, change the nature of the opinion and does not therefore impose liability on the Commission where none is imposed by the opinion itself.

(cc) The applicant also refers to the financial aid granted by the Commission (for which the positive opinion was likewise important). In this regard, it must not be overlooked that only a small part of the sum which had been granted was actually paid and that the rest will only be released when the final shape of the restructuring of the applicant's production becomes clear.

(dd) Finally, with regard to the complaint that account was not taken of the consequences of not including in Decision No 234/84 rules for the adjustment of quotas, it must be said that that important change in the law (abolition of the possibility of obtaining an adjustment under Article 15 of Decision No 1696/82) had already been undertaken in the forerunner to Decision No 234/84. That complaint might therefore have been justified had it been brought at the appropriate time. However, the applicant did not bring an action at that time, even though it was already aware of the change in June 1983 and, as I mentioned at the beginning, also protested against it.

(c) It must further be stated, with regard to the *principle of the protection of legitimate expectation*, which is at the heart of the applicant's case, that it is undeniably part of Community law (see paragraph 19 of the *Töpfer* judgment). [3] However, it is also clear that it is very restrictively applied. Thus, as the Commission has emphasized, the application of the principle will depend to some extent on whether the alteration in question was foreseeable and on whether an overriding matter of public interest took precedence over it (Judgment in Case 74/74, [4] paragraphs 42 and 43; see also the

2 — Judgment of 10 December 1957 in Joined Cases 1 and 14/57, *Usines à Tubes de la Sarre* v *High Authority*, [1957] ECR 105.

3 — Judgment of 3 May 1978 in Case 112/77, *August Töpfer & Co. GmbH* v *Commission*, [1978] ECR 1019.

4 — Judgment of 14 May 1975 in Case 74/74, *Comptoir National Technique Agricole (CNTA) SA* v *Commission*, [1975] ECR 533.

judgments in Cases 78/77 [5] and 146/77. [6] In particular, it is not sufficient that transactions were undertaken in the expectation that certain rules would remain in force; a much more important factor is whether *obligations* towards the competent authorities, secured by deposit, have been entered into (judgment in Case 74/74. [4] Similarly, it was emphasized in the judgment in Case 90/77 [7] that protection of legitimate expectation was also required 'where under the preceding system traders have already informed the competent authorities of their intention to carry out specific transactions over a period extending beyond the time of the introduction of the new system and have irrevocably *committed* themselves thereto, where appropriate by paying a deposit' (paragraph 6). The judgment in Case 68/77 [8] (in which it was held that the rules in question required no previous authorization or any firm commitment on the part of the person concerned with respect to the authorities responsible for the management of the organization of the markets in question, paragraph 8) points in the same direction, as does the judgment in Case 90/77 [7] dealing with a binding customs tariff ruling, in which it was held that such a ruling, by its very nature, can refer only to the rules in force at the time and cannot protect the person to whom it was issued from amendments to those rules, since it cannot be considered equivalent to the issue of certificates, declarations and other documents concerning specific transactions (paragraph 9).

In the light of those judgments, it is not possible to speak in this case of a breach of the principle of the protection of legitimate expectation in the drafting of Decision No 234/84 in relation to the *opinion* delivered by the Commission in 1980 on the applicant's investment programme, since that opinion in no way entailed an obligation to carry out the programme. The fact that such an opinion was delivered can hardly mean that the guidance that it was intended to give, which was formulated with reference to the circumstances then prevailing and in the light of foreseeable developments, must continue to have effect without alteration until the project has been completely carried out, that is to say, until a time by which the situation may have significantly changed and measures of a different sort may have become necessary. To accept any other interpretation would confer on an opinion legal effects which it does not of itself possess and which it can at most acquire *in conjunction with other measures* adopted in the exercise of the discretion granted for that purpose (as is the case for example, in a very specific way, with Article 4 of Decision No 234/84).

Because of the fundamental premiss on which the principle of the protection of legitimate expectation depends, it is equally difficult to accept the proposition that the inclusion in the earlier quota systems of a provision for adjustments in respect of new installations could give rise to a legitimate expectation that similar rules would always be part of the system. Moreover, it must be recognized, as the Commission has demonstrated in detail, that the rules for the adjustment of quotas were made subject to more and more stringent conditions on each occasion that the quota system was restructured to take account of changing circumstances. If matters are viewed in that way, there can be no question — to employ

4 — Judgment of 14 May 1975 in Case 74/74, *Comptoir National Technique Agricole (CNTA) SA* v *Commission*, [1975] ECR 533.

5 — Judgment of 1 February 1978 in Case 78/77, *Firma J. Lührs* v *Hauptzollamt Hamburg-Jonas*, [1978] ECR 169.

6 — Judgment of 13 June 1978 in Case 146/77, *British Beef Company Limited* v *Intervention Board for Agricultural Produce*, [1978] ECR 1347.

7 — Judgment of 27 April 1978 in Case 90/77, *Helmut Stimming KG* v *Commission*, [1978] ECR 995.

8 — Judgment of 14 February 1978 in Case 68/77, *IFG-Intercontinentale Fleischhandelsgesellschaft mbH & Co. KG* v *Commission*, [1978] ECR 353.

a formula used in the judgment in Case 68/77 [8] of the Commission's having conveyed anything that could have justified the expectation that, regardless of the development of conditions on the market, the previous rules would be maintained without alteration (paragraph 8).

(d) To sum up therefore, it must be said that on the basis of the arguments advanced under the first submission, there are no grounds for considering that the Commission committed a misuse of powers and a breach of the principle of the protection of legitimate expectation by not including in Decision No 234/84 a provision corresponding to, or even — as far as the decisive conditions are concerned — going beyond, that contained in Article 15 of Decision No 1696/82.

2. *Infringement of the right to engage in economic activity*

In its second submission the applicant argues that, because the contested decision, in spite of the fact that the installations had been approved, did not grant additional quotas for the hot-rolled strip mill in Bagnoli, it is not possible, on account of unfavourable operating conditions, to achieve the goal of improving production and profitability which those installations were intended to achieve. In that way, the conditions vital to the applicant's existence have been affected. It was even stated in the reply that the Bagnoli plant could not be used, which may be regarded as depriving the applicant, without compensation, of the favourable effects of an initiative which had been approved.

On this point also, I am unable to agree with the applicant.

It must not be forgotten that it is incorrect to speak of a Commission *approval* of the Bagnoli plant, and that an opinion delivered under Article 54 of the ECSC Treaty does not constitute a guarantee that an investment will be turned into practical reality. It must also not be forgotten that the Court clearly emphasized in an earlier decision (Judgment in Case 244/81, [9] p. 1482) that acceptance of the proposition that the system of production quotas should be organized in such a way that undertakings may find in it a guarantee of proper utilization of their production capacity would fail to appreciate the true purpose of Article 58 of the ECSC Treaty. That article in no way places the Commission under a duty to guarantee a minimum level of production to any given undertaking (paragraphs 26 and 27). Furthermore, the Commission is right in saying that the contested rules do not make it entirely impossible to operate the Bagnoli plant. In reality, the applicant can transfer to Bagnoli reference production from within its group (that is to say, from plants which have been closed or which are to be closed under the restructuring programme) in a quantity such as to permit a level of utilization of the plant which is above the average level of utilization in this sector in the Community. That is immediately obvious if it is borne in mind that:

(i) according to the applicant's statement of 12 May 1980, total production in Bagnoli for 1983 and 1984 was to be 65 000 and 715 000 tonnes respectively;

(ii) a reduction of about 350 000 tonnes in the capacity of the hot-rolled strip mill in Cornigliano was already planned;

and

(iii) the Cornigliano plant, with a capacity of 2.3 million tonnes, was completely closed down in May 1984, as required by the latest restructuring plant, with the consequence that the corresponding

8 — Judgment of 14 February 1978 in Case 68/77, *IFG-Intercontinentale Fleischhandelsgesellschaft mbH & Co. KG* v *Commission*, [1978] ECR 353.

9 — Judgment of 11 May 1983 in Case 244/81, *Klöckner-Werke AG* v *Commission*, [1983] ECR 1451.

reference production (as well as that of other plants which were closed down) was available for Bagnoli.

As the Court is aware, the Commission also disputes this claim and here too the better arguments lie on its side.

3. *Contradiction between the Commission's earlier statement of its intentions and its attitude at the time that the contested decision was adopted*

In its third submission the applicant complains that the Commission, by failing to provide in Decision No 234/84 for the possibility of granting the applicant additional quotas (which would have made the Bagnoli plant economic and facilitated essential restructuring, so as to create a viable, modern plant), contradicted its statements regarding the applicant's competitivity and its contribution to restructuring made at the time that the investment programme for Bagnoli was approved. It also complains that the Commission thereby disregarded the objectives laid down in Article 3 of the ECSC Treaty (which speaks *inter alia* of orderly supply to the common market, allowing necessary amortization, increasing production potential and improving the working conditions and standard of living of workers). The way in which Decision No 234/84 is drafted, so far as the adjustment of reference production is concerned, does not make it possible to ensure that an improvement in production actually takes place and that the Bagnoli plant operates in such a way that the necessary amortization is possible. Moreover, it is thus made impossible for the applicant to satisfy the demands of its customers and to fulfil long-term contracts concluded with rolling mills, with the consequence that Italy has become a net importer of rolled products since the ratio between domestic production and domestic demand is lower than that prevailing in the other Member States.

It rightly contends that it is difficult to imagine how there could be a contradiction between statements of intention of totally different kinds: on the one hand, an opinion under Article 54 which is merely advice given in the light of the then prevailing situation and, on the other, a quota system established in a crisis situation for the purpose of re-establishing the equilibrium between production and demand, a system, moreover, which had to be made stricter as a result of the deepening crisis, so that there is no question of Decision No 234/84 being intended to make it possible for undertakings to return to a situation of economic and financial equilibrium, as the applicant claims it was. If, on the other hand, the applicant's argument were to be accepted and opinions given under Article 54 were to be regarded as significant for the purposes of the subsequently adopted rules governing quotas, that would undoubtedly entail an unacceptable limitation on the powers granted for the purpose of overcoming the crisis, and the danger would thereby arise that the crisis machinery might no longer be able to function. As far as the alleged disregard of the objectives laid down in Article 3 of the ECSC Treaty is concerned, it must be borne in mind in the first place that the Commission cannot simultaneously pursue them all in their entirety in all circumstances (as was already made clear in the cases cited by the Commission on page 18 of the defence). Secondly, it cannot be accepted that the Commission's estimation of the relative importance to be attributed to each of those objectives when drafting Decision No 234/84 constitutes a misuse of powers simply because the Commission's assessment did not accord with the applicant's. In that regard, it is important to remember that, as has already been

mentioned, it was by no means impossible for the applicant to bring its Bagnoli plant into operation and that the plant can be made perfectly viable with the help of production quotas transferred from plants which have been or are to be closed. Furthermore, it should also be pointed out that Article 3 (a) speaks of an orderly supply to the *common* market. Thus, it cannot possibly be concluded that every undertaking must be guaranteed a certain share of its domestic market in respect of every product.

4. *Breach of the principles of solidarity and proportionality*

Under this heading the applicant claims that Decision No 234/84 is defective inasmuch as it makes it impossible to take account of the particular situation of the applicant (as regards its production capacity and the fact that it was forced to delay full implementation of its investment programme). In that way the applicant, which had lost part of its market share, claims to have been placed at a disadvantage. The correct thing to do would have been to enable it to achieve a utilization of capacity consonant with the size of its market in Italy, something which would also have avoided unlawful discrimination. In fact, it maintains, there is a negative balance in Italy (and in Great Britain) in trade in rolled products (which account for part of the applicant's production), while in France and in the Federal Republic of Germany, there is a positive balance. The applicant pointed out in its reply that its production capacity in respect of rolled products was to be reduced by 4.1 million tonnes, while no correspondingly large reduction in capacity was required from German undertakings. Finally, at the hearing it showed, with the help of the Commission's statistics, the extent to which the market share held by Italian undertakings in products falling under Categories Ia and II declined both as regards the Italian market and as regards the Community as a whole, by comparing the statistics for the period from July 1981 to June 1982 with those for the first three quarters of 1984.

In addition to what has been said in this connection with regard to related arguments, I would like to make the following observations.

In my opinion, it must be accepted that the Commission rightly sought to share out the consequences of adjusting production to the lower level of demand in a non-discriminatory way by fixing production quotas basically in accordance with actual *production* for the years 1977 to 1980. It was also justified in taking no account of the national markets when establishing that system. (It should be noted in this regard that Italy is apparently a net exporter of what are known as long products, which compensates to some extent for the fact that Italy has a negative balance in regard to rolled products.)

With regard to the applicant's reference to the planned reduction in capacity, it is also interesting to note that its particular situation most certainly was taken into account in this connection. The Commission demonstrated this in detail in regard to the products which were taken into account and with express reference to the reductions carried out *before* 1980, even though they could not as such be taken into consideration.

With regard to the applicant's complaint of discrimination, it is also useful to examine

how the applicant's production (including the additional quotas for Category I granted under Decision No 2794/80) developed. The Commission showed, and the applicant did not dispute, that, if the period in which Decision No 1831/81 was in force is compared with that in which Decision No 234/84 was in force, the applicant's production in respect of Category Ia and in respect of Categories Ia to d taken together shows a significant increase as a proportion of total production in spite of the fact that demand in Italy for those products had decreased to a greater degree than demand in the Community as a whole.

With regard to the statistics which the applicant produced at the hearing, the Commission demonstrated that they need to be corrected on certain points, with the consequence that the decline in the share of the Italian market and of the Community market as a whole held by Italian undertakings is not as great as the applicant claims. Moreover, the Commission not only convincingly showed how the market share held by Italian undertakings in the common market declined (because Italian undertakings requested fewer additional quotas for the production of welded tubes than undertakings in other countries); it also made clear that the phenomenon which the applicant sought to establish on the basis of those statistics was in fact caused by Article 15 B of Decision No 234/84 (which provides for special measures where there have been significant alterations in traditional deliveries).

It follows that the submission just dealt with, with its various details which are often difficult to grasp and appraise, also provides no grounds for a declaration that Decision No 234/84 is unlawful.

5. *Breach of the law* (presumably meaning infringement of Article 58 and other provisions of the ECSC Treaty)

This submission is not mentioned in the reply and that doubtless justifies the conclusion that the applicant is no longer pursuing it (perhaps because of the Commission's objection that since it could not be subsumed under the heading 'misuse of powers' it is inadmissible under the second paragraph of Article 33 of the ECSC Treaty).

If that is not the case (and in the second action the applicant was not limited to pleading misuse of powers), it must be stated that the arguments advanced in this connection add nothing new to the case. Essentially, all that has been claimed is that Article 58 (like Article 54) of the ECSC Treaty does not justify a prohibition on production or a prohibition on the construction and bringing into operation of new installations. All that needs to be said on this subject has already been said in other contexts, where it has been pointed out in particular that the result feared by the applicant was not inevitable, even if additional quotas were not granted for the Bagnoli plant, because that plant could still function in a perfectly satisfactory way by making use of reference production transferred from plants which had been closed or which were to be closed. Moreover, the Commission rightly drew attention to the relevant case-law (judgment in Joined Cases 311/81 and 30/82), [10] in which it is emphasized that it is not the purpose of Article 58 of the ECSC Treaty to give undertakings a guarantee that their production capacity will be properly used,

10 — Judgment of 11 May 1983 in Joined Cases 311/81 and 30/82, *Klöckner-Werke AG* v *Commission*, [1983] ECR 1549.

because that provision is not in fact designed to enable undertakings 'to exempt themselves in a period of crisis from the consequences of their earlier decisions regarding investment and output when such decisions have proved to be ill-suited to the trend of the economy' (paragraph 25).

6. *Absence of a statement of reasons*

I can deal in an equally summary fashion with the final submission, which complains that no reasons were given for repealing the provision on adjustments contained in Article 15 of Decision No 1696/82.

It is sufficient to state in that regard that the repeal in question had already been carried out by the decision preceding Decision No 234/84, so that there was no reason to deal with that matter in the statement of reasons for Decision No 234/84. Moreover, the Commission has shown that, by means of numerous contacts with representatives of Eurofer, the opinion of the undertakings concerned was obtained on the draft of what later became Decision No 2177/83. In that context it was stated — with supporting reasons — that the adjustment rules in question were to be repealed and that fact was also mentioned in the communication sent to the Council. It is thus not possible to speak of the absence of a statement of reasons in regard to the decision preceding Decision No 234/84.

7. For all the foregoing reasons, Decision No 234/84 cannot be regarded as defective on the ground that it did not permit the applicant to obtain an adjustment of its reference production by reason of the fact that it had brought its Bagnoli rolling mill into service. The consequence of that is that the main claim in Case 63/84 is without foundation, as is the main claim in Case 147/84.

III — The remaining heads of claim

1. *Adoption of measures under Article 34 of the ECSC Treaty* (Case 63/84)

The measures which may be adopted when a contested decision or recommendation is declared void are (a) reference of the matter back to the Commission and (b) a declaration that the measure involves a fault of such a nature as to render the Community liable.

Reference back to the Commission is clearly excluded in this case because there are no grounds for declaring Decision No 234/84 void. With regard to the second of the above-named measures, no evidence was produced which suggests the existence of a fault of such a nature as to render the Community liable. It thus appears that a measure of that kind is not what the applicant had in mind. If it were, it would follow from the finding that Decision No 234/84 is not unlawful that the Community cannot in principle incur liability on account of that measure.

The only conclusion which may be reached therefore is that the additional claim brought in case 63/84 is obviously without foundation.

2. *Declaration that the Commission is liable to compensate the applicant* (Case 147/84)

If this claim refers to a declaration to be made under the first paragraph of Article 34 of the ECSC Treaty, it is clear without any further discussion that it cannot be accepted. The only ground which the applicant advances for its claim is that Decision No 234/84 is unlawful and that has already been shown not to be the case.

If however the applicant intended to seek damages under the second paragraph of Article 34 of the ECSC Treaty, then it must

be observed that such a claim can only succeed if the Commission fails to take within a reasonable time the necessary steps to comply with a decision that a measure is void. Such a claim may not therefore be brought at the same time as a claim for a declaration that a measure is void; not even — contrary to the applicant's contention — in the form of a conditional claim.

Thus the additional claim made in Case 147/84 must fail.

C. Consequently, all that remains is for me to propose that the applications should be dismissed as unfounded and that the applicant should be ordered to pay the costs.