5. The extent to which external trade must be taken into consideration in connection with measures to be adopted under Article 58 of the ECSC Treaty is for the Commission to decide and in arriving at that decision it must take account of the Community steel industry's own needs and the Community's interests in its relations with non-member countries. Therefore it is not possible to infer from Article 58 any obligation requiring the Commission to exempt from the quota system the production which certain undertakings might prefer to channel towards export markets.

6. There are no reasonable grounds for denying that the Commission's choice of the criterion based on undertakings' actual production for the purpose of defining the "equitable basis" for the determination of production quotas within the meaning of Article 58 (2) of the ECSC Treaty accords with that provision. Indeed, that criterion, as adjusted by Article 4 of Decision No 2794/80, constitutes, in the first place, an objective basis of assessment which avoids the uncertainties inherent in determining a factor which is partly conjectural, such as production capacity; secondly, it enables total production to be reduced without altering the positions of the undertakings on the market as between each other.

7. Since Decision No 2794/80 fixes a definite reference period for determining steel undertakings' reference production figures, only production capacity which actually existed in that period may be taken into account.

In Case 119/81

KLÖCKNER-WERKE AG, a steel undertaking having its registered office in Duisburg, represented by Professor Bodo Börner of the University of Cologne, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Norbert Koch, acting as Agent, assisted by Professor Eberhard Grabitz of the Free University of Berlin, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the notification of 6 April 1981 by which the Commission fixed the applicant's reference production figures and production quota for rolled products in Group I (hot-rolled wide and narrow strip) for the second quarter of 1981 is void,

THE COURT,

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and conclusions, submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

In view of the slump in demand for steel in the third quarter of 1980 both on the Community market and on the world market, the considerable fall in the utilization rate of Community steel undertakings and the collapse of the price of steel, the Commission considered that the Community was confronted with a period of manifest crisis within the meaning of Article 58 of the ECSC Treaty.

The indirect courses of action available to the Commission proved to be ineffective or insufficient to cope with the crisis and the Commission considered that it had to intervene directly, by means of binding measures relating to production, in order to restore the

balance between supply and demand. By Decision No 2794/80 of 31 October 1980 (Official Journal 1980, L 291, p. 1) it established a system of steel production quotas for steel manufacturers in the Community.

Article 2 of that decision provides that the Commission is to fix quarterly production quotas for crude steel and for four groups of rolled products: hot-rolled wide and narrow strip; reversing mill plate and wide flats, heavy sections (sheet piling, wide flanged beams, other beams and other sections, permanent way material) and light sections (coiled wire rod, concrete reinforcing bars and other merchant bars).

According to Article 3 (1) of the decision, the quarterly production quotas are to be fixed by the Commission for each undertaking on the basis of the reference production figures of that undertaking and by application of abatement rates to those reference production figures.

Article 3 (2) provides that the Commission is to notify each undertaking of its reference production figures and of its production quotas resulting from the application of the abatement rates.

Article 4 of the decision lays down the method of determining the quarterly reference production figures for each undertaking for both rolled products and crude steel.

The general rules are fixed by paragraphs (1) and (2) as follows:

(1) For each month of the relevant quarter, reference is to be made to the same month during the period from July 1977 to June 1980 during which the total production of the four groups of rolled products was the highest. The three months thus chosen, which will not necessarily be consecutive, are to constitute the reference period.

(2) The reference production figures are to be the same, for crude steel and for each of the other groups of rolled products, as the production of the corresponding items during the reference period.

Paragraphs (3), (4) and (5) of Article 4 describe the particular cases in which the reference production figures, and consequently the quotas, are to be increased.

According to Article 4 (3), the Commission must, while taking account of the criteria given, increase the reference production figures of undertakings which, during the period from July 1977 to June 1980, had an average rate of utilization of production facilities of 10 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.

Article 4 (4) provides that where, further to an investment programme duly reported and not the subject of an unfavourable opinion, the undertaking activates a new plant after 1 July 1980, the Commission is, on certain conditions and within specific limits, to adapt the reference production of that undertaking.

Article 4 (5) provides for an increase in an undertaking's reference production figures to take account of restructuring.

In accordance with the second subparagraph of Article 5 (1) of Decision No 2794/80 the rate of abatement in relation to the reference production for rolled products was fixed for the second quarter of 1981 by Article 1 of Commission Decision No 664/81 of 13 March 1981 (Official Journal 1981, L 69, p. 22) as follows:

Group I	Hot-rolled wide and narrow strip	35.62%
Group II	Reversing mill plate and wide flats	32.13%
Group III	Heavy sections (sheet piling, wide flanged beams, other beams and other sections, permanent way material)	25.57%
Group IV	Light sections (coiled wire rod, concrete reinforcing bars and other merchant bars)	32.43%

According to Article 6 (3) of Decision No 2794/80, from the first quarter of 1981 onwards production quotas were to be fixed for rolled products in Groups I, II and III, excluding, however, permanent way material and, in so far as such products are processed in the Community, reversing mill plate for the production of welded tubes, hot-rolled wide and narrow strip for the production of welded tubes, hot-rolled wide strip for the production of tinplate and ingots, rounds and squares for seamless tubes.

Article 7 (1) of Decision No 2794/80 requires undertakings to comply with the production quotas notified to them by the Commission. Article 7 (2) restricts, by group of products, deliveries of products subject to the quota system carried out by undertakings within the common market to 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.

Article 8 (1) of the decision provides that an excess tolerance of 3% is to be accorded for each quota, provided that total production may not exceed the sum of the quotas for the four groups of products.

Under the first paragraph of Article 9 undertakings exceeding their production quota or that part of the quota which, under Article 7 (2), may be delivered within the common market, are to be fined.

Article 14 of Decision No 2794/80 provides that where the production or delivery restrictions imposed by the decision or its implementing measures entail exceptional difficulties for an undertaking, it may refer the matter to the Commission. The Commission must then examine the case without delay in the light of the objectives of the decision and where appropriate adapt its provisions.

Pursuant to Article 3 of Decision No 2794/80 and Article 1 of Decision No 664/81 the Commission notified Klöckner-Werke AG of Duisburg by a telex message of 6 April 1981 of its reference production figures, adapted in accordance with Article 4 of Decision No 2794/80, and its production quotas resulting from the application of the abatement rates for the second quarter of 1981. According to the notification, the production quotas had been adjusted in accordance with Article 6 of Decision No 2794/80.

The figures fixed in that way were as follows:

	Reference production				Reduction	Quota 2nd quarter 1981
	April 1978	May 1978	June 1978	Total		
	tonnes	tonnes	tonnes	tonnes	%	tonnes
Rolled products						
Group I	243 621	334 779	257 768	836 168	35.62	538 325
Group II	0	0	0	0	32.13	0
Group III	9 630	12 414	14 451	36 495	25.57	27 163
Group IV	95 589	104 213	89 485	289 287	30.43	201 257
Total I to IV	348 840	451 406	361 704	1 161 950		766 745
Crude steel	411 652	522 795	399 026	1 333 473	34.01	879 959

II — Written procedure

On 15 May 1981 Klöckner-Werke AG made an application to the Court under Articles 33 and 36 of the ECSC Treaty for a declaration that the Commission's notification of 6 April 1981 is void in so far as it fixed its reference production figures and the production quota for rolled products in Group I for the second quarter of 1981.

The written procedure followed a normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the parties were asked to answer a number of questions and they complied with that request within the time allowed.

III — Conclusions of the parties

The *applicant* claims that the Court should:

(a) Declare the Commission's decision contained in its letter of 6 April 1981, received on 9 April 1981, to be void in so far as it fixes the applicant's reference production figures and production quota for the rolled steel products in Group I;

(b) order the defendant to pay the costs.

The *Commission* contends that the Court should:

(a) Dismiss the application as unfounded; and

(b) Order the applicant to pay the costs.

IV — Submissions and arguments of the parties in the written procedure

The *applicant* supports its application with a number of submissions and arguments by which it seeks to show that both Decision No 2794/80 and the individual decision of 6 April 1981 are unlawful.

The *Commission* considers that the applicant's submissions and arguments are all unfounded.

A — The principle of equal minimum employment

The *applicant* complains that in the general Decision No 2794/80 the

Commission failed to take account of the principle contained in Article 58 of the ECSC Treaty that a "minimum level of employment" should be guaranteed and to insert a provision to that effect in that decision. The Commission also misapplied Article 4 (3) of Decision No 2794/80 because when it calculated the average rate of utilization of the applicant's hot-strip mill No 2 at Bremen the production capacity on which it based its calculation was too low. Both errors came to be incorporated in the individual decision at issue.

(a) It follows from the last sentence of the first subparagraph and from the second subparagraph of Article 58 (2) of the ECSC Treaty that rules governing production must primarily enable employment to be maintained as far as possible. That aim, which is expressly prescribed for the system based on a compensation fund, also applies to the system of production quotas. The lower the utilization of capacity, the greater the risk to jobs. Therefore assistance must be provided and in the case of a system of production quotas this must be done by raising the quotas to provide a minimum level of employment equal to the Community average.

(b) The individual decision at issue does not satisfy those requirements. The Commission took the production capacity of the applicant's hot-strip mill No 2 at Bremen to be 355 000 tonnes a month whereas the capacity of that mill from July 1977 to June 1980 was actually 459 000 tonnes a month. Therefore the mill's capacity was utilized only to the extent of 39% of its maximum possible production and the increase to be granted under Article 4 (3) ought to have been proportionately higher. The average rate of utilization of mills of the Community is 52% and in some undertakings it is even as high as 70%.

By adopting the contested individual decision the Commission infringed the Treaty and misused its powers.

The figure the Commission ought to have taken as the maximum production capacity is 459 000 tonnes a month. As evidence the applicant offers the testimony of witnesses, submits experts' reports prepared by the undertaking Kawasaki and Prof. R. Jeschar and an opinion of the undertaking Stein-Heurtey and asks the Court to make an order for the mill to operate at its maximum capacity for six weeks.

(c) For the purposes of applying Article 4 (3) of Decision No 2794/80 it is not the capacity which was once declared for statistical purposes which is relevant, but actual present capacity. This is the determinant factor in the calculation of the minimum level of utilization in accordance with the principle that continuity of employment should be safeguarded. Only the utilization of present capacity is an indication of the extent to which jobs are in jeopardy.

Certainly statistical information provided by undertakings must in principle be considered to be accurate; but if there are "serious indications" that those figures are wrong, the Commission must check them and use the correct figures. In the applicant's case there were "serious indications" of that kind, as is shown by the experts' reports in its possession. Moreover, the Commission was not unmindful of those considerations because it withdrew its original decision and made a fresh calculation for 1977, 1978 and 1979 based on

355 000 tonnes a month; that correction, however, is far from sufficient.

(d) Another reason why the applicant's capacity should be fixed at a level above the Commission's estimate is that the Commission took no account at all of the capacity of mill No 1 at Bremen which ought to have been included in the Commission's calculations. That mill was to a large extent taken out of operation in 1974 in connection with the restructuring measures promoted by the Commission. The capacity of the mill is 169 000 tonnes a month, increasing the applicant's capacity by that amount and thus lowering its utilization rate still further. The production capacity of that mill cannot be left out of account when that of other undertakings, which have continued in full production, is at present taken into account in full in the calculation of the quotas.

(e) As regards the reference period for the assessment of the rate of utilization of the applicant's production facilities, the Commission over-estimated that rate and under-estimated the average rate of utilization of the other undertakings inasmuch as in both cases it altered the reference period in relation to the general reference period for the general reference production figures of each undertaking, which reduced the difference between the two figures by 5%.

If the principle governing the general reference production figures for each undertaking referred to in Article 4 (2) read together with Article 4 (1) of Decision No 2794/80 had been applied, the applicant would have been allowed to choose the most favourable month from the three equivalent months of the reference period, namely the month during which the utilization of its capacity was at its lowest. This would have reduced the estimate of its utilization of capacity.

Secondly, the Commission's choice of reference period for the calculation of the average rate of utilization of other undertakings lowered that rate. The Commission shifted that period back by six months, taking the period from January 1977 to December 1979 instead of the usual period of July 1977 to June 1980. The result of that was to lower the utilization rate of undertakings because the first six months of 1980 were better than the first six months of 1977.

(f) All those factors combined to produce the legally incorrect result shown in the contested individual decision. Article 58 of the ECSC Treaty requires the Commission to arrange the quota system in a way which avoids particularly low utilization of capacity by undertakings thus preventing employment from falling below a certain minimum level. It must not, therefore, adhere blindly to production in the past but must consider present capacity. The minimum level of employment should be understood as meaning the minimum level of utilization which should be the same as the average level of utilization of undertakings in the Community.

The applicant's plant should therefore operate at least at the average rate that results from the utilization calculated on the basis of reference production figures refered to in Decision No 2794/80.

Production may be legitimately taken into account if it does not yet show considerable differences in the utilization of each undertaking's capacity. In this case that condition is not met.

The task which Article 58 gives to the Commission is not to accept the situation on the market but to improve it. Undoubtedly total production in the European Coal and Steel Community must be reduced as far as possible to the point at which, apart from exports, it no longer exceeds demand in the Community. For that purpose, however, it would have been possible to fix the permissible production of each undertaking by laying down a specific minimum percentage for utilization of capacity.

By considering itself bound in principle to proceed on the basis of previously established rates of utilization of capacity, instead of exercising its powers in an effort to secure a minimum level of utilization corresponding to average utilization in order to achieve the aim of Article 58 of the ECSC Treaty, namely the maintenance of employment, the Commission misused its powers and at the same time violated the prohibition of discrimination contained in Article 4 (b) of the ECSC Treaty.

The Treaty does not prescribe any particular method of calculation; it merely contains provisions as to the result to be achieved, namely the uniform maintenance of employment which must be estimated according to the level of utilization of capacity.

The Commission wrongly failed to adopt a provision under which the quota calculated in accordance with Article 4 (3) of Decision No 2794/80 could be increased, especially where the quota does not guarantee a minimum level of utilization.

The *Commission* considers that the complaints of the infringement of a "principle of a uniform minimum level of employment" by the method prescribed in paragraphs (1) to (3) of Article 4 of Decision No 2794/80 for the calculation of the reference production figures are unfounded.

(a) No "principle of uniform minimum level of employment", as understood by the applicant, can be inferred from the ECSC Treaty, especially not from the second sentence of the first subparagraph and the second subparagraph of Article 58 (2).

The concepts of "equal rate of utilization of capacity" and "equal minimum employment" are not the same; for the same rate of utilization of capacity represents a different number of jobs, depending on the size of undertakings. The system described in Article 58 (2) of the ECSC Treaty assumes that levels of activity of undertakings vary. The only rule that may therefore be inferred from that provision is that employment should be maintained as far as possible, even in the event of a critical decline in demand. It is not possible to discern an obligation to guarantee the same utilization of production capacity.

Likewise, the phrase "continuity of employment" appearing in the second half of the second paragraph of Article 2 of the ECSC Treaty simply means the maintenance of employment and not the guaranteeing of equal utilization of capacity. The same applies to Article 3 (c) of the Treaty.

(b) When demand is in critical decline a quota system of the kind introduced by Decision No 2794/80 can, as far as the maintenance of employment is concerned, only aim to spread the necessary sacrifices as evenly as possible

among undertakings. Since the number of jobs depends not on capacity but on production, an even distribution of the burden, particularly where jobs are concerned, would be best achieved by fixing quotas according to actual production.

In the event of a critical decline in demand the Commission is not required to ensure that every undertaking utilizes its capacity at the same rate. An undertaking's utilization capacity is the result of its position on the market, which itself depends on a large number of factors that are independent of the policy pursued by the Commission. It would be a misapplication of the Commission's powers under Article 58 of the Treaty if it were to try to undertake a general rectification, by means of the quota system it introduced, of the rate of utilization of undertakings which is the result of changing market forces. Crisis management does not give it the power to redistribute production but only the power to adjust production to the decline in demand as evenly as possible for all the undertakings.

(c) Article 58 of the ECSC Treaty gives the Commission a wide margin of discretion in elaborating the quota system. It kept within that margin, especially as regards the contested bases used for the calculation of the reference production figures. The contested rules are appropriate, objective and in keeping with the principles enunciated in Articles 2, 3 and 4 of the Treaty.

Any system of production quotas introduced under Article 58 of the ECSC Treaty must inevitably be related to production; the extent to which production must be reduced pursuant to that provision can only be determined if the quotas are fixed on the basis of actual production. Production capacity provides no measure of the degree of adjustment of production to the decline in demand and the level of activity is merely an arithmetical proportion showing the ratio of production to production capacity. However, the quota system envisaged in Article 58 must be so arranged that the production quantities are fixed in absolute figures.

If actual production in the reference period is used as the standard reference production for the calculation of the production quotas this enables the quota system to be established "on an equitable basis", as Article 58 of the ECSC Treaty requires. The possibility provided in paragraphs (3) to (5) of Article 4 of Decision No 2794/80 of increasing standard reference production by notional reference production is an exception to the rules; it is subject to strict conditions and intended to reward conduct which is particularly in line with the aim of the Community's steel policy. Furthermore, in not raising the reference production to the level of the average rate of utilization of the other undertakings the Commission kept within the limits of its discretionary powers.

(d) The assertion that a lower rate of utilization of capacity poses a greater threat to jobs is too general. The threat to jobs posed by a lower rate of utilization is greater only if the number of jobs have not been adjusted to the lower rate of utilization. A decline in

demand and a resultant decline in production must regrettably lead to a reduction in the number of persons undertakings employ. Article 58 (2) of the ECSC Treaty is founded on that premise for it gives the Commission the task of maintaining employment in undertakings "as far as possible" and not of maintaining every job.

The model calculations made by the applicant afford no support for its argument to the effect that there is a link between utilization of capacity and the degree to which jobs are threatened.

(e) On the assumption that Article 58 (2) of the ECSC Treaty requires employment to be maintained uniformly, an intervention by the competent authorities to raise to the Community average a rate of utilization falling below that average would be a breach of that very principle. Any quota system must start out from a specific volume of demand; any increase in the quota of one undertaking will therefore reduce the sale prospects of another undertaking and endanger jobs in the latter undertaking. A quota system which brought the capacity of each undertaking up to the Community average would not be an "equitable basis".

(f) To raise utilization of capacity is permissible only in strictly limited cases and in special circumstances which justify a departure from the principle that production should be reduced uniformly on the basis of the actual production of undertakings in the past. Article 4 (3) of Decision No 2794/80 makes provision for a special case of that kind. The applicant has benefited from that provision more than any other undertaking.

(g) As regards the application in the Decision of 6 April 1981 of Article 4 (3) of Decision No 2794/80, the applicant's production capacity was correctly assessed: the capacity to be attributed to the hot strip mill No 2 at Bremen could not have been higher than 355 000 tonnes a month or 4.26 million tonnes a year.

The basis for the calculations of capacity was the figures provided by undertakings under Article 14 of Decision No 21/66 of the High Authority of the ECSC of 16 November 1966 on information to be furnished by undertakings about their investments (Official Journal, English Special Edition 1965-1966, p. 280). The term "capacity" means "maximum possible production" which is in turn dependent on the capacity of plant preceding the production plant, on the production structure and the capacity of following plant. When undertakings' production capacity is taken into account under Article 4 (3) of Decision No 2794/80 the actual conditions in each undertaking should be appraised.

The term "production capacity" or "maximum possible production" should not be confused with the theoretical concept of "technical capacity"; this bears no relation to the market but constitutes an abstract indication of the maximum production for which a plant is technically designed.

Therefore production capacity must be calculated on the basis of "nominal capacity" because for the purposes of the calculation of the average production capacity in the reference period from July 1977 to June 1980 only the capacity

which existed in that period counts. Secondly, "nominal capacity" is not the same as "technical capacity" which is determined on theoretical assumptions about the maximum utilization of the plant.

(h) The Commission must depend on the accuracy of the information provided by undertakings themselves. There is therefore no difference between capacity "declared for statistical purposes" and "actual" capacity. To verify the accuracy of the figures declared by undertakings would have entailed excessive administrative expense in the application of the system.

(i) The applicant declared a capacity of 355 000 tonnes a month (4.3 million tonnes a year) instead of the previous figure of 314 000 tonnes a month (3.8 million tonnes a year) for the first time in its declaration of 1 January 1980 without giving any explanation. After making a check the Commission, by letter of 11 December 1980, amended its previous decision and adopted a capacity of 4.26 million tonnes a year for the reference period from July 1977 to June 1980. In so doing it attributed to the applicant a production capacity greater than that which it was required by law to accept.

(j) The figures for hot-strip mill No 1 are unimportant because that mill was closed down in April 1974; it does not therefore represent production capacity for the purposes of Article 4 (3) of Decision No 2794/80 and could not be taken into account in the calculation of the average rate of utilization in the reference period.

(k) The Commission emphasizes that even under the quota system the applicant has maintained the level of its previous production and its rate of utilization was higher than in 1977, 1978 and 1979, having risen from 47.4% to 50.6% in the first quarter of 1981.

B — The prohibition of subsidies

The *applicant* contends that the allocation of quotas under Decision No 2794/80 was not concluded "on an equitable basis" within the meaning of Article 58 (2) of the ECSC Treaty because the Commission ought to have rectified the negative effects of subsidies granted in violation of the Treaty to the steel industry in some Member States, in particular, Belgium, France, Italy and the United Kingdom.

(a) According to the figures available, steel groups in those countries have received from or have been promised by their governments for the period from 1975 to 1983 subsidies totalling at least DM 60 000 million. It is clear from the case-law of the Court, in particular its judgments of 23 February 1961 in Case 30/59, *Steenkolenmijnen* [1961] ECR 1 and 6 July 1971 in Case 59/70 *Netherlands* v *Commission* [1971] ECR 639, as well as from Article 1 of Commission Decision No 257/80 of 1 February 1980 establishing Community rules for specific aids to the steel industry (Official Journal 1980, L 29, p. 5) that to a large extent those subsidies constitute prohibited aid.

That infringement of the Treaty brought about increases in production which would not have occurred if the subsidies had not been available: hence the

importance of this aspect for the undertakings which complied with the Treaty. The Commission fixed the applicant's quotas as if it were unaware that such subsidies had been and were being granted. Such conduct is incompatible with the ECSC Treaty.

If the United Kingdom subsidy rate per tonne in 1975/76 to 1978/79 were taken as a basis, the applicant alone would be entitled to DM 320 million in subsidies each year.

(b) When allocating production quotas under Article 58 of the ECSC Treaty the Commission ought to have awarded a fidelity bonus in the form of increased quotas to undertakings which had not infringed Article 4 (c) of the ECSC Treaty or, better still, cut the production quotas of subsidized undertakings normally granted under the general rules. In the result the equal treatment applied by the Commission as a matter of principle constitutes an infringement of Article 58 of the ECSC Treaty because it is "no equitable basis" for the sharing out of production.

(c) Even if the argument were true that in most cases the subsidies in question were not specific subsidies granted to the steel industry but general measures as provided for in Article 67 of the ECSC Treaty, nevertheless they are measures which seriously damage the steel undertakings of other countries and the applicant in particular. In spite of that the Commission has failed, in breach of Article 8 of the Treaty to exercise its powers under Article 67.

The prohibition of subsidies was of fundamental importance for the conclusion of the ECSC Treaty and still is for the continued existence of the common market in steel; the production of customs duties and quantitative restrictions in trade between Member States may only be maintained if the prohibition of subsidies is enforced at the same time. It is vital to pay very special attention to the prohibition of subsidies where Article 58 of the ECSC Treaty is applied, and not just in connection with Article 88, which, moreover, has not been applied either.

At the more general level of Community policy excessive disharmony between the various aims is unacceptable; therefore the Community may not, in the sphere of the EEC, prohibit a State subsidy but in the sphere of the European Coal and Steel Community declare another, higher subsidy to be tolerable.

The *Commission* considers that the complaint of a breach of the prohibition of subsidies is unfounded.

(a) The applicant's figures on the amounts of subsidies granted to the steel industry in Belgium, France, Italy and the United Kingdom should be treated with caution: a study by a private interest group may be accepted as an assertion only and not as appropriate means of proof.

In any case, the question of the amount of subsidies granted by Member States to the steel industry is immaterial in the present case.

(b) Such subsidies are not caught by the prohibition enunciated in Article 4 (c) of the ECSC Treaty. That prohibition

covers only subsidies or aids specifically granted to the coal and steel industries; aids received by those industries as part of the general exercise of the powers retained by Member States in the sphere of economic, industrial, regional, fiscal or social policy must be judged in the light of Article 67. That article does not prohibit general aids but merely lays down a procedure whereby the positive or negative effects of such action on coal and steel undertakings are to be eliminated.

(c) Moreover, aids granted specifically to the steel industry are not contrary to the prohibition of subsidies enunciated in Article 4 (c) of the Treaty provided that they remain within the limits of the Community rules contained in Commission Decision No 257/80 of 1 February 1980 and No 2320/81 of 7 August 1981 establishing Community rules for aids to the steel industry (Official Journal 1981, L 228, p. 14).

(d) In any case, special subsidies which are caught by the prohibition contained in Article 4 (c) of the ECSC Treaty cannot be taken into account in the context of a system of production quotas introduced under Article 58. To enforce the prohibition of subsidies contained in Article 4 (c) the Commission only has as its disposal the procedure laid down in Article 88 of the ECSC Treaty by which it is required, in the event of a breach of the prohibition of subsidies, to institute proceedings against the Member State concerned for infringement of the Treaty.

(e) If undertakings which received a special subsidy had their quota reduced under the system of production quotas this would allow the prohibited subsidy to continue to exist and thus maintain the infringement of the Treaty. To link the aims of Article 58 of the Treaty with those of Articles 4 (c) and 88 would not be permissible.

In providing that the principles set out in Articles 2, 3 and 4 are to be taken into account when quotas are fixed, the first sentence of Article 58 (2) does not refer to Article 4 (c), which is not addressed to the Community but to the Member States.

To replace the sanction for which Article 88 of the Treaty provides in the event of breach of the prohibition of subsidies with another sanction to be incorporated in the quota system would offend against the general principle of public law that powers conferred by public law may not be used for purposes for which another form of action is mandatory.

C — The assent of the Council

The *applicant* argues that General Decision No 2794/80 did not receive the assent of the Council of Ministers provided for in Article 58 (1) of the ECSC Treaty. Although the Council did discuss the question of the introduction of a quota system under Article 58 of the ECSC Treaty at its meeting on 30 October 1980, it did not give its assent to Decision No 2794/80. At that meeting it did not even have the first draft of that decision and was therefore unaware of its terms.

(a) Article 58 (1) of the ECSC Treaty lays down a two-stage procedure: in the

first stage the Commission announces on its own initiative and without being required to obtain the assent of other institutions that there is a "period of manifest crisis"; in the second stage it must "establish a system of production quotas". The Council's "assent" must cover not just any establishment of quotas but the introduction of a specific system worked out in all its details and taking the form of a decision.

(b) The aim of the procedure laid down in Article 58 (1) of the ECSC Treaty is to confer legitimacy upon the decision to introduce a quota system in the Community. For this the Council's cooperation is indispensable. Only the Council, composed of representatives of the Member States' governments which are answerable to the national parliaments, has the capacity and the power to incorporate in all its details such a radical measure as the introduction of a production quota system into the policies of the Member States and of the Community. That power is consistent with the general task which the first paragraph of Article 26 of the ECSC Treaty assigns to the Council: the Council may not delegate general powers to the Commission and then, by approving the proposal-making institution's general intentions and leaving it to work out the details, evade its obligations.

(c) The most which is to be inferred from the decisions of the Court is that slight amendments to a decision previously adopted by the Commission with the Council's valid assent do not require a fresh assent. However, Decision No 2794/80 introduced a wholly new quota system and therefore needed the Council's assent.

The *Commission* contests the factual and legal bases of the applicant's arguments.

(a) The Council did give its assent as required by the first subparagraph of Article 58 (1) of the ECSC Treaty.

The provision does not specify what is to be understood by "assent" but the scheme and aim of the provision show that the Commission need not at that stage transmit to the Council, in the form of a decision, a quota system worked out in all its details.

(b) Article 58 provides for a three-stage decision-making procedure: in the first stage the Commission concludes, pursuant to the first subparagraph of paragraph (1), that the Community is confronted with a period of manifest crisis and that the means of action provided for in Article 57 are not sufficient to deal with it; pursuant to that same subparagraph the Commission takes the decision, in the second stage, to introduce a system of production quotas; paragraph (2) authorizes the Commission to work out, in the third stage, the details of the quota system and to make it legally binding by means of one or more legal instruments. The Council participates only in the second stage of that decision-making procedure: the Commission must obtain the Council's assent to the introduction of a quota system but not to the details of the system and its transposition into legal instruments. The Council's assent concerns the principle of whether a quota system is to be introduced and the material terms of the system proposed, the provisions which the Commission subsequently works out may not depart from the material terms of the system to which the Council gave its assent.

(c) That view is wholly consistent with the roles the ECSC Treaty, particularly Articles 14, 26 and the first and second subparagraphs of Article 58 (1), assign to the Commission and the Council.

(d) The purpose served by the Council's assent also shows that it need not cover the details of the quota system. It is not intended to give the Commission's decision democratic legitimacy which it already has in any case; it is part of the Council's main task under the ECSC Treaty, namely to harmonize the action of the Commission and that of the governments which are responsible for the general economic policies of their countries. That view is confirmed by the decisions of the Court.

(e) The procedure by which Decision No 2794/80 was adopted was in conformity with the requirements of Article 58 of the ECSC Treaty.

D — The fixing of delivery quotas for the common market for exports

The *applicant* contends that, together with Article 7 (2) of Decision No 2794/80, the contested decision unlawfully fixes the part of quarterly production quotas which may be delivered within the common market or exported. The quota does not just limit production; it also restricts the quantities which the applicant may deliver in the second quarter of 1981. Therefore the Commission infringed the Treaty and misused its powers.

(a) Production and deliveries are not the same. Production is what an undertaking produces in a given period, whether it delivers it to other persons or puts it into stock for its own purposes during that period; deliveries are what an undertaking delivers to third parties in a given period, whether it does so from its current production or own stock, or procures them from third parties. The first paragraph of Article 9 of Decision No 2794/80 imposes a fine not just where an undertaking has exceeded its production quota but also where it has delivered too much within the common market. However, Article 58 (1) of the ECSC Treaty provides only for production quotas, as the Commission expressly acknowledges in the first paragraph of point 6 of the preamble to Decision No 2794/80.

(b) Contrary to what is said under point 6 of the preamble to Decision No 2794/80, the aim of Article 58 of the ECSC Treaty is not "to restore the balance between supply and demand on the market". The Treaty, and in particular Article 58, did not give the European Coal and Steel Community that task. To restore the balance needs not only action to curb supply, which the Commission has the power to take, but also action to influence demand, which is not within the Commission's powers. The aim of the European Coal and Steel Community is merely to help to restore the balance between supply and demand by influencing supply with the means made available under Article 58, which are production quotas and not delivery quotas.

Article 29 of the Convention on the traditional provisions confirms that Article 58 of the Treaty does not contain a power to fix delivery quotas.

The decisions of the Court also establish that the Commission has no "implied powers" under the Treaty to fix delivery quotas.

(c) The fact that delivery quotas are illegal means that Article 7 (2) and the words "or that part of this quota which, under Article 7 (2) and (3) may be delivered within the common market" contained in the first paragraph of Article 9 of Decision No 2794/80 are inapplicable.

(d) By the contested decision the Commission introduced delivery quotas not just for the common market but also for all the markets of non-member countries. Those export quotas stem indirectly from the production quotas inasmuch as the applicant can deliver in non-member countries only the part of its production it does not sell on the home market; to non-member countries it may export only the amount remaining of a quantity fixed by the Commission.

However, in no case is the Commission entitled to restrict quantities delivered to non-member countries. It does not have the power to regulate the markets of non-member countries. This is confirmed by Article 3 (f) of the ECSC Treaty. That provision sets the Commission the task of promoting the growth of international trade which is obviously not promoted, but rather impeded, by quantitative restrictions on exports. A comparison of Article 58 of the ECSC Treaty and Article 61 (c) leads to the same conclusion: the Treaty undoubtedly foresaw the problem of influencing exports and permitted minimum export prices on strict conditions; but it did not permit the fixing of maximum limits on exports or on production intended to be exported. This is consistent with the basic orientation of the ECSC Treaty which left matters of external trade policy to the Member States.

(e) Nor do delivery quotas need to be introduced in order to ensure that the system operates properly, in other words to prevent the quantities produced for export to non-member countries from reaching the Community market. The Commission ought to have fixed the production quotas at the level of home demand only and allowed undertakings to deduct from production counting towards production quotas the quantities they proved to have exported to non-member countries. Since no provision to that effect was inserted in Article 7 (1) of Decision No 2794/80 the restriction of exports is not permissible and the production quotas and delivery quotas are illegal.

In the *Commission's* view the complaint that the prohibition against the fixing of delivery quotas was violated is inadmissible and in any event unfounded.

(a) The complaint that the contested decision "together with Article 7 (2) of Decision No 2794/80" unlawfully fixes delivery quotas for the common market and for exports is inadmissible. Article 7 (2) merely provides the basis for a normative obligation which is contained in the general decision and on which the individual decision is not based.

(b) Article 7 (2) of Decision No 2794/80 contains no rules whatever on "delivery quotas": undertakings' "deliveries" comprise, first, products manufactured under the quota fixed each quarter and, secondly, stock left over from earlier production. Decision No 2794/80 lays down no restrictions at all on the sale of stock; this would, however, have been necessary if it had been intended to introduce a delivery quota system.

The aim of Article 7 (2) is to prevent products not sold outside the Community from coming on to the common market in the event of a decline in exports and thus jeopardizing the preliminary aim of the production quota system, which is to adapt production to the decline in demand within the Community. Article 7 (2) prohibits the ratio which deliveries within the common market bear to total production in a reference period from being exceeded.

(c) Decision No 2794/80 does not fix any "delivery quotas". Therefore the only question the Court must decide is whether the rules contained in Article 7 (2) of that decision are covered by the power to introduce a production quota system conferred upon the Commission by Article 58 of the ECSC Treaty. The answer must be in the affirmative.

Article 58 specifies the conditions for the introduction of a production quota system but leaves the elaboration of the system to the Commission which has a wide margin of discretion in this regard. It must exercise that discretion objectively and above all comply with the aim of the power it has been granted.

That aim is to deal with the critical decline in demand and to adjust supply to demand. In fixing production quotas the Community can fully achieve that aim only within the common market because it is unable to reduce supply from non-member countries. If demand declines on the markets of non-member countries as well there is the danger that the production fixed by quota which may no longer be sold to non-member countries can come on to the common market. Such surplus supply due to external factors could be eliminated by a further cut in production to match the decline in demand abroad or by the introduction of a mechanism putting undertakings under pressure to adjust production themselves to the decline in demand in non-member countries. Since it is required by Article 58 read together with Article 3 (a) of the ECSC Treaty to ensure an orderly supply to the common market "taking into account the needs of third countries", the Commission, in inserting Article 7 (2) in Decision No 2794/80, chose to keep constant the maximum home supply from production fixed by quota. That course has the advantage that production need not be further reduced by action on the part of the appropriate authority and that undertakings are left to decide for themselves whether to adjust their production if demand in non-member countries declines. Article 7 (2) is therefore consistent with the requirements of the market and constitutes the best way of

complying with the principle of proportionality of means.

(d) That interpretation of Article 58 accords with the Treaty and the decisions of the Court.

Although Article 58 only gives the Commission the power to regulate supply, the aim is, after all, to adjust supply to demand; as soon as supply is adjusted to demand balance will be restored.

Article 29 (1) (a) of the Convention on the transitional provisions is not relevant to the interpretation of Article 58 of the ECSC Treaty. The purpose of Article 7 (2) of Decision No 2794/80 is not to fix delivery quotas and it certainly does not concern "deliveries from one area to another within the common market".

The decisions of the Court cited by the applicant concern only the question whether the Community possesses implied powers; that question is not relevant to the present case.

(e) Decision No 2794/80 does not fix "delivery quotas" for exports; products from stock may be delivered without restriction to non-member countries and within the common market irrespective of quarterly production.

Article 58 authorizes the Commission to introduce a system of production quotas yet makes no distinction between "production for export" and "production for disposal within the common market". The aim is to reduce total supply, whether on the common market or the markets of non-member countries. The ECSC Treaty does not only envisage a limitation of production destined for the home market but assumes that a decline in demand is the result of economic developments in the world. Therefore the means used to deal with the crisis, namely the system of production quotas, must take into account the decline in demand on the world market as well.

That conclusion is confirmed by Article 3 (a) of the ECSC Treaty which requires the institutions of the Community to ensure an orderly supply to the common market "taking into account" the needs of non-member countries. The applicant's reference to Article 61 of the ECSC Treaty does not shake that conclusion because it is not a provision intended to deal with crises.

V — Oral procedure

At the sitting on 24 March 1982 *Klöckner-Werke AG*, represented by Professor Börner, assisted by Herbert Gienow, Chairman of the Board of Directors, and Ludwig von Bogdandy, Director, and the *Commission*, represented by Professor Grabitz, presented oral argument and answered questions put to them by the Court.

The Advocate General delivered his opinion at the sitting on 26 May 1982.

Decision

1 By application lodged at the Court Registry on 15 May 1981 Klöckner-Werke AG, a steel undertaking having its registered office in Duisburg in the Federal Republic of Germany, brought an action under the second paragraph of Article 33 of the ECSC Treaty for a declaration that the notification of 6 April 1981 by which the Commission fixed the applicant's reference production figures and production quota for rolled products in Group I (hot-rolled wide and narrow strip) for the second quarter of 1981 pursuant to Commission Decision No 2794/80/ECSC of 31 October 1980 establishing a system of steel production quotas for undertakings in the iron and steel industry (Official Journal 1980, L 291, p. 1) is void.

2 In support of its application the applicant puts forward a number of submissions which may be summarized as follows:

(1) Decision No 2794/80 did not receive, in due form, the assent of the Council;

(2) The Commission disregarded its obligations to guarantee a "minimum level of employment" in fixing the production quotas;

(3) In fixing the production quotas the Commission failed to take account of the effect of illegal subsidies granted by some Member States to steel undertakings;

(4) Instead of fixing production quotas as envisaged by Article 58 the Commission fixed "delivery quotas" and these unlawfully restricted export opportunities;

(5) The undertakings' actual production capacity, particularly the applicant's, was not properly taken into account when the production quotas were fixed.

(1) The submission that Decision No 2794/80 did not receive the assent of the Council

3 The applicant contends that Decision No 2794/80 did not receive the assent of the Council as required by Article 58 (1) of the ECSC Treaty. It alleges that the Council gave only general consideration, at its meeting on 30 October 1980, to the question of introducing a quota system. It was not provided with a draft legal instrument disclosing the measures planned by the Commission and could not therefore give the assent required by the Treaty. With a view to proving its allegations the applicant asks the Court to call for the documents on the basis of which the Council reached its decision and the minutes of the meeting in question.

4 The Commission submits in this regard that the Treaty confers upon it the power to adopt the appropriate measures in the event of a manifest crisis. It argues that the requirement of assent laid down in Article 58 is therefore satisfied once the Council has approved in principle the introduction of a quota system with full knowledge of the material terms of the system planned. It is not necessary, however, for the Council to give its opinion on the details of the system. The consultation which took place in the present case satisfies those requirements and the obtaining of the Council's assent is duly confirmed in the preamble to Decision No 2494/80.

5 Article 58 states that if the Commission considers that the Community is confronted with a period of manifest crisis and the means of action provided for in Article 57 are not sufficient to deal with this it must establish a system of production quotas "after consulting the Consultative Committee and with the assent of the Council".

6 The obtaining of the assent of the Council is one of the essential procedural requirements laid down by the Treaty non-observance of which leads to nullity.

7 It is not disputed in the present case that the Council's assent was sought by the Commission in accordance with Article 58 of the ECSC Treaty and that the Council did in fact approve the draft measures about which it had been informed by the Commission. The existence of that assent is recited in the preamble to Decision No 2794/80 published in the Official Journal of the Community.

8 In support of its submission the applicant has merely put forward a number of value allegations. It has not been able to adduce any evidence which might give reason to doubt that the Council was given the information it required and that it expressed its assent, as the preamble to the contested decision attests. Therefore the applicant's request that the Court should order an inquiry into the circumstances in which the assent of the Council was sought and obtained must be refused.

9 This submission must therefore be rejected.

(2) The submission that the obligation to guarantee a "minimum level of employment" was disregarded

10 The applicant considers that the Commission ought to have acted in accordance with the principles underlying the Treaty and Article 58 in particular and so arranged the system of production quotas that every undertaking would be certain of obtaining a production quota sufficient to guarantee a minimum level of activity and employment proportionate to their capacity. Because the Commission did not take proper account of that factor in Decision No 2794/80 the quota fixed for the applicant did not enable production to be maintained at the level needed to guarantee a minimum level of employment in its undertaking.

11 To support that view the applicant points out that under the second paragraph of Article 2 of the ECSC Treaty one of the Community's tasks is to safeguard "continuity of employment" whilst, according to Article 3, the institutions of the Community must "promote improved working conditions and an improved standard of living for workers"; Article 58 expresses the same idea inasmuch as paragraph (2) thereof provides for the introduction of a system of levies to maintain employment in undertakings whose rate of production has fallen below a given level of reference. The applicant considers that the last-mentioned provision reflects the basic principle on which Article 58 rests and to which the Commission wrongly failed to give effect in the system of production quotas elaborated in Decision No 2794/80.

12 The line of argument advanced by the applicant fails to take account of the true purpose of Article 58 within the system of the Treaty as a whole. The provision is intended to enable the Community to deal with a crisis caused by a decline in demand. It provides for the introduction of a system of production quotas which is intended to spread equitably throughout the iron and steel industry of the Community the unavoidable consequences of the adjustment of production to the reduced number of possibilities of disposal.

13 The goal of those restrictive measures is to improve market conditions so as to enable the profitability of undertakings to be maintained or restored in the long term and thereby enable the jobs which depend on it to be preserved as far as possible. However, contrary to the applicant's contention, Article 58 does not in any way require the Commission to guarantee each individual undertaking a minimum level of production determined in accordance with the undertaking's own criteria of profitability and development. The aim of Article 58 is to spread in the most equitable manner possible amongst all undertakings the reductions required by the economic situation and not to guarantee undertakings a minimum level of employment proportionate to their capacity.

14 As regards Articles 2, 3 and 4, mentioned in paragraph (2) of Article 58 and relied upon by the applicant, it should be observed that the general aims set out in those articles must constantly be reconciled with one another depending on the economic circumstances and therefore priority may not be given to one of those aims to the detriment of the others. As far as the reference in Article 58 (2) to the maintenance of employment is concerned, it is made in relation to a regulatory mechanism to which the Commission has not resorted. It should be added that in establishing the quota system the Commission did not disregard the need to maintain employment as far as possible because it took account, in Article 4 (3) of Decision No 2794/80, of the level of utilization of capacity.

15 This submission must therefore be rejected.

(3) The submission that no account was taken of illegal subsidies and their effect

16 The applicant points out that in breach of an express prohibition contained in the ECSC Treaty subsidies have been paid to undertakings in several Member States, particularly in Belgium, France, Italy and the United Kingdom where for many years the steel industry has been supported by considerable State subsidies. It contends that the Commission never took any action against those subsidies, which had the effect of putting undertakings which had not received such advantages in a position worse than that of those which had. The Commission ought at least to have taken account of this distortion of competition when elaborating the system of production quotas and granted compensation to undertakings which had not received subsidies.

17 The Commission believes that the measures provided for in Article 58 are not an appropriate framework for taking account of the problem of subsidies granted in some Member States to the steel industry. It argues that under the scheme of the ECSC Treaty the problem of aids can be dealt with only on the basis of Article 4 (c), the application of which might lead to the adoption of decisions under Article 88, or within the framework of Article 67, which concerns interference with the conditions of competition. The Commission also points to the link between the question of subsidies and the general rules governing aids. On the question of specific aids to the steel industry, it points out that it has created the general framework for their regulation in Decision No 257/80 of 1 February 1980 and No 2320/81 of 7 August 1981 establishing Community rules for aids to the steel industry (Official Journal 1981, L 228, p. 14).

18 It cannot be denied that the complaints put forward by the applicant in relation to this submission reveal a legitimate concern. In fact it must be stated that the Commission was slow to take action in this field, as is shown by the date of the decisions which it has mentioned. Moreover, the Commission cannot refute the applicant's submission merely by referring to its powers under Article 88 as it seems that it has not made use of those powers.

19 Nevertheless there are no grounds for assuming that when adopting the measures provided for in Article 58 the Commission was under the obligation to take account of distortions on the steel market caused by the grant of aids which might be incompatible with the Treaty. The purpose of Article 58 is to enable the Community to deal with serious crises caused by the decline in demand. Its application demands prompt action which must inevitably be based on relatively simple criteria. It is incompatible with such action to take into account factors, such as the grant of State aids, the appraisal of which involves particularly complex investigations. Although it cannot be denied that when working out the rules on production quotas the Commission may take account of situations which are contrary to Article 4 (c) of the ECSC Treaty and to the rules laid down by its decisions in the field and which are duly proven to exist in the course of the relevant procedures, as it already does when monitoring investment, it is however not possible to go so far as to demand, as the applicant does, that the anti-crisis measures envisaged by Article 58 should be used to counteract the effect of illegal aids granted by Member States.

20 Therefore this submission must also be rejected.

(4) The submission that "delivery quotas" were imposed instead of production quotas and the complaint of unlawful restriction of export opportunities

21 The applicant's complaints under this head apparently refer to the notion "delivery of products subject to the quota system" appearing in Article 7 of Decision No 2794/80 and taken up again in Article 9. The applicant argues that by linking the obligation to observe the production quotas and the possible imposition of penalties to the "delivery" of products the Commission exceeded the limits of its powers under Article 58 inasmuch as that provision provides for the fixing of "production quotas" and not "delivery quotas".

22 The applicant also complains that by introducing quotas of that kind the Commission unlawfully restricted undertakings' opportunities of exporting to non-member countries.

23 On the question of "delivery quotas" it need only be observed that whatever meaning the applicant attaches to that concept it played as little a part as Articles 7 and 9, from which it is derived, in the determination of the production quota allocated to the applicant pursuant to Decision No 2794/80. Therefore this issue need not be examined for the purpose of the decision to be given in this case.

24 As to the question of the restrictive effect which the fixing of production quotas may have on export opportunities, it must be pointed out that this is an inevitable consequence of the application of the machinery established by Article 58 of the Treaty. Any restriction of production has an impact both on opportunities of selling on the Community market and on export opportunities. Therefore the applicant's complaint is in reality directed against the system of production quotas as formulated by the Treaty and not against the Commission's decision which merely applied Article 58.

25 Furthermore it must be observed that neither Article 57 nor Article 58 of the Treaty fail to take account of the relation which exists between action to influence production and the Community's external trade. For example, one of the indirect means of action to influence production mentioned by Article 57 is intervention in regard to commercial policy, whilst Article 58 (1) refers to Article 74, which concerns the regulation of certain aspects of external trade. However, as the Court has already emphasized in other judgments, the extent to which external trade must be taken into consideration in connection with measures to be adopted under Article 58 is for the Commission to decide and in arriving at that decision it must take account of the Community steel industry's own needs and the Community's interests in its relations with non-member countries. Therefore it is not possible to infer from Article 58 any obligation requiring the Commission to exempt from the quota system the production which certain undertakings might prefer to channel towards export markets.

26 For those reasons the complaints put forward in relation to this submission must also be rejected.

(5) The submission that the Commission refused to take into consideration the undertaking's actual production capacity

27 This submission questions both the validity of Decision No 2794/80 and the Commission's estimation of the applicant's production capacity for the purposes of the application of the criteria laid down in Article 4 (3) of that decision.

28 In so far as this submission seeks to question the validity of Decision No 2794/80 the applicant contends that the Commission ought to have based its system of quotas on undertakings' production capacity as well as on their actual production. As to this point it is sufficient to recall what the Court held in its judgment of 3 March 1982 in Case 14/81 *Alpha Steel* [1982] ECR 749 on the matter of the criteria applied by the Commission to define the "equitable basis" for the determination of production quotas within the meaning of Article 58 (2). It is stated in that judgment that there are no reasonable grounds for denying that the Commission's choice of the criterion based on undertakings' actual production accords with that provision. Indeed, that criterion, as adjusted by Article 4 of Decision No 2794/80, constitutes, in the first place, an objective basis of assessment which avoids the uncertainties inherent in determining a factor which is partly conjectural, such as production capacity; secondly, it enables total production to be reduced without altering the positions of the undertakings on the market as between each other.

29 The applicant further contends that when determining its reference production figures and ascertaining the adjustment which Article 4 (3) of Decision No 2794/80 grants to undertakings whose rate of utilization is below the average rate of utilization of comparable plant of other undertakings in the Community the Commission underestimated its production capacity. The effect of this was aggravated by the Commission's failure to take any account of the fact that, in 1974, some time before the start of the reference period, the applicant had shut down an old rolling mill (Bremen No 1) and replaced it by the plant now in operation (Bremen No 2).

30 According to the information which the parties have provided during the proceedings, the production capacity declared by the applicant for 1977, 1978 and 1979 was 3 800 000 tonnes a year. Since on 1 January 1980 the applicant declared a higher production capacity, namely 4 260 000 tonnes a year, in May 1980 the Commission carried out an inspection at the undertaking's premises on the basis of which it estimated its production capacity to be 4 230 000 tonnes a year. In view of the outcome of that investigation the Commission accepted the figure declared on 1 January 1980, namely 4 260 000 tonnes a year, as representing the applicant's production capacity in the period referred to in Article 4 (3) of Decision No 2794/80. The Commission accordingly took that figure as the basis for adjusting and increasing the reference production figures pursuant to Article 4 (3) in its decisions fixing the production quotas for the fourth quarter of 1980, the first quarter of 1981 and the second quarter of 1981, that last decision, dated 6 April 1981, being the only one in dispute in this case.

31 On 1 January 1981 the applicant submitted a new declaration to the Commission in which it declared a production capacity of 5 528 000 tonnes a year. In its application it contends that it is that production capacity figure, representing the rectified result of a production test which it carried out itself, which ought to have been taken into consideration in the contested decision. To support this claim it has submitted as an annex to its application an expert's report dated 1 May 1981 which was later supplemented by an expert's report dated 12 January 1982. Those documents, according to the interpretation placed on them by the applicant, reveal a production capacity still higher than the capacity declared on the previous occasion; this, it believes, is proof that the estimate given in its application is "moderate and careful". As regards its previous declarations the applicant observes that at the time they were regarded as a "routine matter" to which it did not attach any particular importance; if it could have foreseen the consequences which might flow from them it would have certainly prepared them with more care.

32 The expert's report of 1 May 1981 was drawn up for the applicant by a group comprising representatives of the Belgian Centre des Recherches Métallurgiques [Centre for Metal Research], hereinafter referred to as the CRM, and of the undertaking Kawasaki. The experts' joint conclusion was that given its present production programme the undertaking's capacity was 4 050 000 tonnes a year. In their conclusions the experts state that it might be

possible to increase that figure to a point which the experts from CRM were not able to define because they did not have the opportunity to check the information supplied by Klöckner. For their part the experts from Kawasaki add that according to Klöckner's information and Japanese standards output might be raised to 5 844 000 tonnes a year on certain conditions which, according to the information provided, are not, however, fulfilled by Klöckner's present production programme. The applicant itself rejects the experts' first conclusion, considering it inadequate, and bases its argument solely on the separate conclusion of the Kawasaki representatives.

33 In this regard it must be pointed out that the increase in reference production figures which the Commission granted to the applicant pursuant to Article 4 (3) of Decision No 2794/80 was determined on the basis of information provided by the applicant itself pursuant to Decision No 22-66 of the High Authority (Official Journal, English Special Edition 1965-1966, p. 280) and on forms used by every steel undertaking in the Community. The applicant was under a duty to complete those forms accurately and honestly.

34 A review of the history of the dispute shows that at first the Commission proceeded on the basis of information provided by the applicant, which remained uncontested for several years, and then, after an investigation carried out on the applicant's premises agreed to revise the estimate of production capacity in accordance with a new declaration submitted by the applicant. It is unreasonable for the applicant to call in question for a second time, on the ground of new errors of assessment on its part and on the basis of an inconclusive experts' report, the results of calculations based on its own previous declarations which have been duly checked by the Commission.

35 On the question whether for the purposes of determining production capacity a rolling mill that the applicant shut down in 1974 should be taken into consideration it need only be observed that since Decision No 2794/80 fixes a definite reference period only production capacity which actually existed in that period may be taken into account.

36 Therefore this submission must be rejected.

37 Since none of the submissions put forward by the applicants is well-founded, the application must be dismissed.

Costs

38 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs.

39 As the applicant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

	Mertens de Wilmars	Bosco	Touffait
Due	Pescatore	Mackenzie Stuart	O'Keeffe
Koopmans	Everling	Chloros	Grévisse

Delivered in open court in Luxembourg on 7 July 1982.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President