nevertheless impossible to expect the measures referred to in Article 58, which are designed to deal with a crisis, to be used to counteract the effect of illegal aids granted by Member States.

6. Owing to the very nature of the machinery envisaged by Article 58 of the ECSC Treaty, any restriction of production has an impact both on opportunities of selling on the Community market and on export opportunities. The laying down of production quotas would be ineffective if undertakings were to remain at liberty to export quantities without any supervision to non-member countries, since the effect of such exports might be not only to compromise the interests of the Community in those markets but also to deflect some of the goods back to the domestic market and to jeopardize its equilibrium.

7. It lies within the discretion of the Commission to take trade with non-member countries into account in the context of the measures to be adopted in pursuance of Article 58 of the ECSC Treaty. In that respect it is, in fact, for the Commission to take account both of the needs of the common market itself and of the interests of the Community in its relations with non-member countries. Whilst it is true that Article 58 empowers the Commission, in periods of manifest crisis, to take action with regard to production without regard to trade with non-member countries, the provision cannot be interpreted as meaning that it permits no more than the allocation to every undertaking of a comprehensive production quota which may be disposed of either on the domestic market or on the market of non-member countries.

In Joined Cases 311/81 and 30/82

KLÖCKNER-WERKE AG, a steel undertaking having its registered office in Duisburg, represented by Professor Bodo Börner of Cologne University, 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 individual decisions adopted by the Commission on 26 October 1981 and 4 December 1981, fixing the production quotas imposed on the applicant for the fourth quarter of 1981 and the first quarter of 1982 respectively are void wholly or in part,

THE COURT (Fourth Chamber)

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

Advocate General: G. Reischl
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

Faced with a manifest crisis in the steel market within the meaning of Article 58 of the ECSC Treaty, the Commission adopted Decision 2794/80/ECSC of 31 October 1980 (Official Journal L 291, p. 1), establishing a system of production quotas for the Community's iron and steel undertakings, which was to remain in operation until 30 June 1981.

In accordance with Articles 2 to 4 of the above-mentioned decision the Commission fixed, in respect of every undertaking, quarterly production quotas for crude steel and for each of the four groups into which rolled products were divided. The quotas were calculated on the basis of the quarterly reference production figures of each undertaking; to that end, reference was made, for each month of the relevant quarter, 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 had been highest. The three months thus chosen formed the reference period, and the reference production figures for crude steel and for each of the four groups of rolled products were equal to the output of

each of those products during the reference period.

However, in the contingencies envisaged by Article 4 (3) to (5) of the decision, the Commission might, within certain limits increase the reference production figures and consequently the quotas allocated to the undertakings concerned. The decision further provided that, where the production or delivery restrictions imposed by it or by its implementing measures entailed exceptional difficulties for an undertaking, it might refer the matter to the Commission which, having examined the case without delay in the light of the objectives of the decision, would adapt the provisions to the specific circumstances.

On the expiry of that system in view of the persistence of the manifest crisis, the Commission adopted the new general Decision 1831/81/ECSC of 24 June 1981 (Official Journal 1981, L 180, p. 1), whereby the quota system was extended, with some amendments.

In particular, crude steel and rolled products were separated into six categories, the first of which (relating to the products at issue in this case) is subsequently divided into four sub-categories. Only the products falling within that category — apart from a few exceptions — were subjected to the new quota system, since a "monitoring" scheme had been set up in respect of the other products.

The method of calculating the reference production for products subject to the quota system was changed, the new basis consisting of the mean of the output recorded over an extended reference period and the reference production used in fixing the quotas under the system created by Decision 2794/80. The first component of this mean is represented by production (a) in the year 1974; (b) in the 12 most favourable months of the period between July 1977 and June 1980; and (c) in the period between July 1979 and June 1980. The second component is made up of the annual production, as reconstituted from the production quotas awarded to undertakings under Decision 2794/80 during the fourth quarter of 1980 and the first quarter of 1981.

The possibility of individual adjustment which the previous decision had allowed in favour of undertakings whose rate of utilization of productive capacity was more than 10% below the Community average (Article 4 (3)) was abolished, and the general equity clause in Article 14, permitting quotas to be adjusted in cases of "exceptional difficulties" was restricted in the sense that it became applicable only to small-scale undertakings.

In pursuance of the legislation referred to above, the Commission informed Klöckner-Werke AG, Duisburg, in a letter of 26 October 1981, of the reference production figures and the production quotas imposed on it for the fourth quarter of 1981, and, in a letter of 4 December 1981, of the reference production figures and the production quotas for the first quarter of 1982. It is common ground that the two letters contain individual decisions. As far as these cases in particular are concerned, in the first-mentioned individual decision the production quotas for products in Categories I a and I b were fixed at 197 920 tonnes and 203 563 tonnes respectively and, in the second, at

178 611 and 191 931 tonnes. Both decisions further fixed, for products of all categories, those parts of the quotas which might be delivered on the Community market.

Pursuant to Article 33 of the ECSC Treaty, Klöckner-Werke brought an action to have the Commission's decision of 26 October 1981 declared void (in whole, or, in the alternative, in part). The application was lodged at the Court Registry on 8 December 1981.

The same undertaking then brought a further action, by an application lodged at the Court Registry on 15 January 1982, to have the Commission's decision of 4 December 1981 declared void (in whole, or, in the alternative, in part). By an order of 5 May 1982 the Court, in view of the close relationship between the two cases, ordered that they be dealt with jointly for the purposes of the procedure and judgment.

Upon hearing the report of the Judge-Rapporteur and the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. By an order of 13 October 1982, the Court decided to assign the joined cases to the Fourth Chamber.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare the defendant's decision of 26 October 1981 null and void;
2. Alternatively:
   (a) Declare void the production quotas contained in the said decision to the extent to which they fall below the following figures:

   Products of Category I a — 330 462 tonnes per quarter;

   Products of Category I b — 339 924 tonnes per quarter;

   (b) Declare the production quotas void to the extent to which the production is demonstrably intended for non-member countries;

   (c) Declare the decision void to the extent to which it prescribes a part of the production quotas which may be delivered on the Community market;
3. Declare the defendant's decision of 4 December 1981 null and void;
4. Alternatively:
   (a) Declare void the production quotas contained in the said decision to the extent to which they fall below the following figures:

   Products of Category I a — 302 500 tonnes per quarter;

   Products of Category I b — 325 000 tonnes per quarter;

   (b) Declare the production quotas void to the extent to which the production is demonstrably intended for non-member countries:

   (c) Declare the decision void to the extent to which it prescribes a part of the production quotas which may be delivered on the Community market;
5. Order the defendant to pay the costs.

The *Commission* contends that the Court should:

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

III — Submissions and arguments of the parties

In support of its actions the *applicant* puts forward five submissions, directed

both against Decision 1831/81 and against the individual decisions of 26 October and 4 December 1981. The arguments relate to:

(a) breach of the principle of minimum utilization of undertakings' productive capacity;

(b) infringement of an essential procedural requirement, namely absence of a statement of the reasons on which Decision 1831/81 was based;

(c) failure to take account of the effects of infringements of the prohibition of State subsidies for the steel industry;

(d) the unlawfulness of fixing "delivery" quotas for the common market and of setting quotas on exports;

(e) the absence, or in any case the absence of proof, of the Council's assent.

A — First submission

The *applicant* objects that the aforementioned general decision and individual decisions contravene the principle of minimum utilization laid down in the second subparagraph of Article 58 (2) of the ECSC Treaty. It appears from that article that the production quota fixed for an undertaking may not reduce the utilization rate of the latter's productive capacity below a certain limit. That lower limit corresponds to the average rate of utilization amongst Community undertakings resulting from the reference production figures as reduced pursuant to Decision 1831/81, regard being had to the lower limit. The Treaty therefore forbids the Commission to cut back reference production by a given, uniform percentage without taking account of the rate of utilization of capacity prevailing at the outset; on the other hand, the Treaty does call for the protection of the potentially worst-affected undertakings, running the greatest risks as a result of the reduction, namely those undertakings whose capacity-utilization rate is particularly low at the outset. That derives from a general principle existing in the legal systems of all Member States, and is also in keeping with considerations of logic, since it is clearly more perilous for an undertaking cutting back production, to reduce a utilization rate from 50% to 45% than to reduce it from 100% to 90%.

The individual decisions under dispute do not meet those requirements. The output of the No II hot-rolled wide-strip mill in the applicant's Bremen works was recorded by the Commission as having a production potential of 355 000 tonnes per month, whereas in fact its potential amounted to 459 000 tonnes per month for the period from July 1977 to June 1980. The productive potential of the mill was therefore exploited at a rate of no more than 30.8% (individual decision of 26 October 1981) and 28.4% (individual decision of 4 December 1981), whereas the average amongst Community undertakings reached approximately 51.4% for the fourth quarter of 1981 and 48.2% for the first quarter of 1982.

The applicant takes the view that the figure which should be adopted as showing maximum productive capacity, and which should have been accepted by the Commission, was 459 000 tonnes per month, as was demonstrated beyond any doubt by several output trials and by the expert reports prepared by the Kawasaki Steel Corporation, the Institut de Recherche de la Sidérurgie Française and Professor Jeschar of the Technical

University of Clausthal-Zellerfeld. Should those reports not be considered adequate, Klöckner offers to supply further evidence. The applicant takes the view that for the purposes of fixing production quotas there is no reason to take account of previous notifications concerning productive capacity, supplied by the undertaking for statistical purposes on Questionnaire No 2/61; it is only the actual, current capacity which is decisive, because it is not permissible to compare figures relating to an earlier period with those corresponding to a later period, since the comparison must be made in terms of one and the same period.

On the basis of those suppositions, the applicant calculates the quotas which should have been awarded to it if it had been granted a capacity-utilization rate on a par with the Community average and concludes that for the fourth quarter of 1981 quotas should have amounted to 330 462 tonnes for products in Category I a and 339 924 tonnes for those in Category I b, and, for the following quarter, to 302 500 and 325 000 tonnes respectively. That is the calculation underlying the alternative claims that the decision under dispute be declared partially void to the extent to which they fix quotas lower than the amounts mentioned above.

The *Commission* objects at the outset that the alternative claims are inadmissible. It notes that the applicant demands the fixing of higher production quotas than those granted to it, but alleges that the applicant may not present such a claim otherwise than in the context of an action alleging failure to act, the conditions for bringing which are not satisfied in this particular instance.

As to the substance of the case, the Commission argues that the applicant has not really explained to what extent it is possible to infer from Article 58 — or any other provision — of the ECSC Treaty either the alleged prohibition of any uniform reduction of reference production figures without taking the initial capacity-utilization rate into account, or indeed the alleged duty to protect undertakings whose initial utilization rates are particularly low. In fact no provision of that kind is contained in the Treaty, nor can it be deduced from a general principle supposed to exist in the law of all Member States. In those circumstances, any argument from the applicant seeking to demonstrate that the Bremen No II wide-strip mill has a higher output capacity than that adopted by the defendant is irrelevant.

In its reply the *applicant* claims that the objection of inadmissibility is unfounded, since the contested decisions harm rather than benefit the undertaking, which would, if it were not for them, be entitled to produce all the steel and rolled products that it wished. In those circumstances, it maintains that an action for failure to act would be meaningless. Besides, an administrative decision giving cause for complaint is, according to the ECSC Treaty, open only to an action for a declaration that it is void, not to an action for failure to act.

As regards the prohibition of any uniform reduction in reference production figures, and the duty to protect undertakings having a particularly low utilization rate, those principles derive not only from Article 58 of the ECSC Treaty but also from Article 14 b, inserted into Decision 1831/81 by Commission Decision 533/82 (Official Journal L 65, p. 6) in respect of reinforcing rods.

Turning to the productive capacity of its Bremen No II mill, the applicant, producing an additional expert report, notes that both it and the other documents attached to the file disclose a

further ground for complaint, namely that the Commission had misapplied the provisions of Article 4 (3) of Decision 2794/80, and that that error had repercussions on the fixing of quotas under Decision 1831/81, by virtue of Article 6 (1) (b) thereof. For the purposes of fixing the quota, it was the capacity in 1977, 1978 and 1979 which was decisive, and for those years capacity already stood at 459 000 tonnes per month, with the result that the quotas should have been higher at the very commencement of the system.

In its rejoinder the *Commission* contends that, by inserting a new article into the text of Decision 1831/81, it had merely taken account of the fact that the quota system might cause some undertakings exceptional difficulties, owing to the modest size of their plant and to their dependence on a limited range of products. The Commission had therefore confined itself to basing a finding of exceptional difficulties on different criteria, but without in any way recognizing an obligation to allow a minimum utilization of capacity. The existence of such an obligation had, indeed, been repudiated by the Court in its judgment of 3 March 1982, *Alpha Steel* v *Commission,* Case 14/81 (ECR [1982] 749).

B — Second submission

The *applicant* observes that the Commission did not supply reasons for putting the undertaking, by virtue of Decision 1831/81, on a worse footing than it had under the previous decision, 2794/80. This amounts to an infringement of an essential procedural requirement, namely an infringement of the first paragraph of Article 15 of the ECSC Treaty whereby decisions must state the reasons on which they are based.

The *Commission* contests the basis of the claim, contending that the quota system provided for by Decision 1831/81 did not entail a general deterioration in the position of undertakings as compared with the system laid down by Decision 2794/80. At all events, it observes that the adjustments made to that system by Decision 1831/81 were explained in the recitals in the preamble to the decision, so that the duty to state reasons has been complied with.

The *applicant* replies that Decision 1831/81 seriously aggravated its situation as regards products in Categories I a and I b, owing to the fact that only half of the production quota as calculated on the basis of the previous decision — pursuant to Article 4 thereof, in particular — has now been taken into account. No reasons for that deterioration were stated in the recitals in the preamble to Decision 1831/81.

The *Commission* replies that Klöckner's argument here ignores the method of calculating the reference production prescribed by Article 6 (1) of the decision at issue. In that calculation, account is taken, for obtaining the first amount of the last year before the crisis, of the crisis-years 1977 to 1980 and of a year falling shortly before the commencement of the quota system; for obtaining the second amount, account is taken of adjustments effected under Decision 2794/80, which are brought into the calculation of the reference production figures in their undiminished form — not, therefore, to the extent of one half only. The reference production figure is defined by the arithmetical mean between the two amounts; the divergences resulting from individual adjustments pursuant to Decision

2794/80 are then corrected against an average production level. The system laid down by the earlier decision was amended because it had unduly benefited certain undertakings in the Community, notably the applicant; the new system merely had the effect of partially abolishing that advantage. In the circumstances there could therefore be no question of "aggravation", and thus the claim that no statement of reasons had been provided for a — non-existent — aggravation was devoid of purpose. Moreover, since the scope of Decision 1831/81 was of general application, the Commission was required to do no more than set forth the reasons for the amendments to the system of calculating the reference production figures, which was done in the fourth recital of the preamble to that decision.

C — Third submission

The *applicant* argues that the distribution of quotas amongst Community undertakings, in pursuance of the general decision in dispute, is not drawn up on an equitable basis inasmuch as the Commission made no allowance for the effects of subsidies granted to the steel industry in certain Member States, contrary to Article 4 (c) of the ECSC Treaty. It takes the view that the defendant should have taken those illegal subsidies into account, either by granting a higher quota to unsubsidized undertakings or by lowering the quota awarded to undertakings which benefited from such aids. Indeed, the above-mentioned infringement of the Treaty entailed increases in output for the undertakings enjoying the benefits, and such increases would not have occurred without subsidies as those undertakings had been able to carry out larger investment programmes than the others.

According to Klöckner the Commission may not confine itself to referring to the possibility of taking action against those breaches under Article 88 of the ECSC Treaty (never enforced by the defendant in this context, incidentally), nor may the Commission point to Article 67 of the Treaty since that article is not concerned with subsidies prohibited under Article 4 (c).

The *Commission* does not deny that some Member States subsidize some steel undertakings, but it does dispute the accuracy of the information on the subject supplied by the applicant in Annex 6 to the application, concerning the amount of such subsidies. In any event, the defendant contends that the amount of the subsidies has no bearing on this case.

Subsidies paid to steel undertakings by Member States do not fall within the ambit of the prohibition laid down by Article 4 (c) of the ECSC Treaty; that prohibition applies only to subsidies or aids specially granted to the coal and steel industries, whereas the aids which those industries receive as part of the general exercise by Member States of their residual powers in the fields of economic, industrial, regional, fiscal and social policy should be appraised in the light of Article 67. That article does not forbid general aids, but limits itself to establishing a procedure for eliminating the effects — whether positive or negative — of State intervention in coal or steel undertakings.

The applicant is right in saying that Article 67 of the ECSC Treaty does not derogate from the prohibition of subsidies laid down by Article 4 (c), but that does not mean that the Commission is not able to avail itself of Article 67,

since the two provisions are designed to apply to different forms of subsidy inasmuch as Article 67 relates to general aids whereas Article 4 (c) is concerned with specific aids, namely those paid exclusively to the steel industry.

Furthermore, specific aids in favour of the steel industry are not, according to the Commission, contrary to the prohibition laid down by Article 4 (c) of the Treaty provided that they remain within the limits of the Community rules defined in Commission Decisions 257/80 of 1 February 1980 (Official Journal L 29, p. 5) and 2320/81 of 7 August 1981 (Official Journal L 228, p. 14) establishing Community rules for aids to the steel industry.

In any case, since specific subsidies fall within the prohibition under Article 4 (c) of the ECSC Treaty, they cannot be taken into consideration in connection with a system of production quotas established pursuant to Article 58; in order to enforce the prohibition of subsidies under Article 4 (c) the Commission may employ only the procedure laid down by Article 88 of the ECSC Treaty, which requires it, should there be a breach of the prohibition, to take action against the Member State in question, following the procedure provided for in cases of infringement of the Treaty.

To apply, in the context of the production-quota system, a "malus" to the quotas of undertakings receiving special subsidies would not strike at the forbidden subsidy and would thus allow the infringement of the Treaty to continue; an amalgamation of the objectives of Article 58 of the Treaty and those of Articles 4 (c) and 88 is not permissible.

The replacement of the sanction under Article 88 of the Treaty, in cases where there is a breach of the prohibition of subsidies, by another sanction, to be introduced as part of the quota system, would conflict with a general principle of public law according to which a public authority is not entitled to use its powers to achieve ends for which some other form of action is made mandatory.

D — Fourth submission

The *applicant* asserts that the decisions under dispute unlawfully fix the share of the quarterly production quotas which may be delivered within the common market, and the share which may be exported. The quota therefore does not confine itself to limiting production, but also limits the volume which the applicant may deliver during the two quarters concerned. However, delivery quotas for the domestic market are necessary in order to prevent products not disposed of outside the Community from being offered on the common market, and to that end it would have been sufficient when fixing production quotas to disregard proven exports; yet the Commission fixed production quotas not only for the common market but also in respect of exports to non-member countries, whereas such a provision cannot be based on Article 58 of the ECSC Treaty. It may be considered lawful by virtue of the first paragraph of Article 95 of the Treaty, provided that the conditions for applying the article are satisfied, which is not the case here.

The Commission has thus infringed the Treaty. Moreover, having failed to give a statement of its reasons for including

exports in delivery quotas, it has also disregarded an essential procedural requirement.

In reply, the Commission objects that the applicant has misinterpreted Article 5 of Decision 1831/81, since that provision in no way envisages the fixing of "delivery" quotas. Deliveries by undertakings comprise two elements, namely products manufactured under the quarterly quota and stocks deriving from earlier production; Decision 1831/81 lays down no limit on the disposal of stocks, whereas the matter would have had to be dealt with if it had been desired to introduce a system of delivery quotas. The provisions contained in Articles 5 and 8 of the general decision are designed to prevent products not disposed of outside the common market from being offered within the Community whenever exports are reduced. It was for that reason that it was forbidden to exceed the ratio, as fixed for the reference period, between Community deliveries and total output. The objection that the provisions are illegal is thus unfounded.

The applicant is wrong in complaining that it can export no more than a portion of its products. In the first place, products drawn from stock may be delivered without any restrictions, either within the common market or to non-member countries. In the second place, Decision 1831/81 contains no provision limiting the share of production which may be exported, as the Community is concerned that undertakings should export their products, precisely for the purpose of relieving the domestic market. The applicant's objection in this matter is therefore devoid of purpose.

The *applicant* asserts in reply that, under Article 5 of Decision 1831/81, it may export only that part of its production quota which it does not dispose of within the common market, which constitutes a quantitative restriction on exports and hence both a delivery quota and an imposition of quotas on exports. The ECSC Treaty is thereby infringed, inasmuch as it left to Member States full powers over their export systems. In that connection the applicant cites Articles 59, the first paragraphs of Articles 61, 71 and 73 respectively, and Article 74 of the Treaty, together with Article 19 of the Convention on the transitional provisions.

In reply the *Commission* contends that the applicant's argument overlooks the possibility — which is always available — of disposing of products in stock. It adds that it is at all events necessary to take into account the fact that the demand for steel is declining on the markets of non-member countries as well, so that a decline in exports leads to an increase in supply on the Community market; in those circumstances the objective pursued by Article 58 of the ECSC Treaty may be attained precisely by the establishment of machinery which obliges undertakings to adjust their output to the fall in the demand from non-member countries; none of this entails an enlargement of the powers conferred on the Commission by Article 58.

E — Fifth submission

According to the *applicant*, the general decision at issue was not the subject of the Council's assent, as laid down by Article 58 (1) of the ECSC Treaty. The Commission, although asked on several occasions to produce the Council's decision giving its assent, confined itself to producing a press bulletin from the

General Secretariat of the Council — a document having no relevance at all. Indeed, it was only by examining the documents submitted by the Commission to the Council for the purposes of the meeting at which the assent was due to be given, together with the minutes and the tape-recording of that meeting, that it was possible to establish whether an "assent" really was forthcoming and whether it had the content required by the ECSC Treaty. There is therefore, in the first place, a lack of evidence.

In any case, the applicant, referring to the arguments set forth in other analogous cases (Cases 119 and 244/81), maintains that the Council's assent is necessary in respect of all the constituent parts of the quota system, not merely in relation to certain supposedly essential aspects thereof — factors which are, moreover, unidentifiable except by means of an objective criterion which the Commission had been unable to specify. That being so, the Council's "assent" would not, even if it was given in this case, have the content laid down by the Treaty. In fact in Case 119/81 — in which an identical question was raised concerning general Decision 2794/80 — the Commission produced the text of its proposals to the Council for the adoption of the system of production quotas (document of 6 October 1980, COM(80) 586 Final). A comparison of that text, which the applicant wishes to have produced, in this case as well, if appropriate, with the definitive text of Decision 2794/80 would disclose the existence of many important differences. There are comparable divergencies between the text of the Commission's original proposals to the Council and the definitive text of Decision 1831/81. In those circumstances it is impossible to discover, from the documents on the file, in relation to which text the Council gave its alleged assent. Furthermore, in the absence of any objective criterion, it is impossible to check whether or not any divergencies between the two texts have a bearing on essential points. The primary requirement of legal certainty is thereby disregarded.

Both at law and in fact the *Commission* contests the applicant's arguments as well as the requests for production of fresh documents, which it regards as unnecessary. As may be seen not only from the preamble to Decision 1831/81 but also from many documents produced in Case 244/81 (proposal of the Commission, Doc. COM(81) 277 Final, of 22 May 1981; press releases of the Council Nos 7330/81 and 7630/81; item published in Official Journal C 196 of 4 August 1981, p. 6), the Council did indeed give its assent. The Commission adds that the first subparagraph of Article 56 (1) of the ECSC Treaty does not specify what is to be understood by "assent"; the scheme and the purpose of the text, however, show that it is unnecessary for the Commission to transmit to the Council a proposal for a quota system which is formulated in every detail and submitted in the form of a draft decision. On the other hand, Article 58 institutes a decision-making procedure in three phases. In accordance with the first subparagraph of Article 58 (1), the Commission notes, as the first phase, 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; as the second phase, the Commission takes the decision to establish a system of production quotas. Article 58 (2), as a third phase, authorizes the Commission to arrange the system in detail and to make it mandatory by means of one or

more instruments. It is only in the second phase that the Council is involved in the procedure. In order to establish a quota system, the Commission must obtain the Council's assent but is not required to do so as far as its arrangement and its embodiment in legal instruments are concerned. Since those principles were observed in this case, the procedure whereby Decision 1831/81 was adopted was consistent with the requirements of Article 58 of the ECSC Treaty, whereas the subsistence of differences between the draft forwarded by the Commission to the Council and the measure adopted by the Commission, following the Council's assent, setting up the quota system, is of no importance; such differences are the result of the decision-making process which culminates in the Council's decision to give its assent; the Commission might indeed, following the discussion in the Council, consider that it had to amend its initial conception of the quota system. It is even possible for the Council to make its assent subject to the adoption of certain rules of the system. It is otherwise quite unnecessary to lay down an objective criterion making it possible to distinguish those portions of a decision which do, and those which do not, require assent, as the latter relates solely to the principle of establishing the quota system, whilst the task of giving specific expression to the principle falls within the powers of the Commission.

IV — Oral procedure

At the sitting on 15 December 1982, Klöckner-Werke AG, represented by Professor Bodo Börner, and the Commission, represented by Norbert Koch, a member of its Legal Department, presented oral argument. In the course of the sitting, the Commission's representative laid two documents before the Court.

The Advocate General delivered his opinion at the sitting on 23 February 1983.

Decision

1 By applications lodged at the Court Registry on 8 December 1981 and 15 January 1982, Klöckner-Werke AG, a steel undertaking having its registered office in Duisburg, Federal Republic of Germany brought two identical actions under the second paragraph of Article 33 of the ECSC Treaty, seeking a declaration of the nullity of the Commission's communications of 26 October and 4 December 1981, in which the Commission fixed, pursuant to general Decision 1831/81/ECSC of 24 June 1981 establishing for undertakings in the iron and steel industry a monitoring system and a new system

of production quotas in respect of certain products (Official Journal L 180, p. 1), in relation to the applicant undertaking, reference production figures and reference quantities, together with production and delivery quotas for derived products in Category I for the fourth quarter of 1981 and the first quarter of 1982. In view of the close relationship between the two cases, they were joined by order of the Court of 5 May 1982.

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

1. Absence of proper assent by the Council to Decision 1831/81;

2. Failure by the Commission to observe its duty to guarantee, by the fixing of production quotas, a minimum utilization of productive capacity, and lack in that regard of a statement of the reasons on which Decision 1831/81 was based;

3. Failure on the part of the Commission to take account, when fixing the production quotas, of the effects of illegal subsidies granted by certain Member States to their steel undertakings;

4. Substitution by the Commission of "delivery quotas" within the common market for the production quotas envisaged by Article 58, and fixing of quotas on exports.

3 In the alternative, the applicant claims that the Court should:

(a) declare void the production quotas fixed by the contested decisions to the extent to which they fall below certain tonnages for Categories I a and I b;

(b) declare the production quotas void in so far as production is intended for non-member countries;

(c) declare void the contested decisions in so far as they prescribe a part of the production quotas which may be delivered on the common market.

4 In relation to the alternative heads of claim it may be observed that the claim in subparagraph (a) above is covered by the second submission, and the claims in subparagraphs (b) and (c) by the fourth submission set out above. Those claims will therefore be considered jointly with the main conclusions to which they relate.

5 It should also be noted, at the outset, that the applicant's line of argument in connection with these actions largely coincides with the submissions made in support of the action in Case 119/81, between the same parties, which gave rise to the judgment of 7 July 1982 ([1982] ECR 2627). In the context of these cases, however, it is appropriate to bear in mind that, in the meantime, Decision 2794/80 of 31 October 1980 (Official Journal L 291, p. 1), which formed the basis of the decision contested in Case 119/81, has been replaced by the aforementioned Decision 1831/81, and furthermore that the applicant has formulated some fresh arguments in support of its action. It will therefore be appropriate to take account simultaneously of the points of law and fact already settled by the previous judgment and the new questions raised by these proceedings.

1. Submission alleging the absence of assent from the Council

6 The applicant does not dispute the fact that the Council gave its assent in connection with Decision 1831/81. The dispute relates to the question whether the assent was given in circumstances consistent with the requirements of Article 58 of the ECSC Treaty.

7 According to the applicant, the Commission should have referred to the Council, not some more or less specific proposals, but a fully elaborated draft text. Consequently, the Commission is required to demonstrate, if challenged, that the decision which it has taken is in keeping with the text which it has submitted to the Council and which has received the latter's approval. Failing such evidence, the decision cannot be regarded as consistent with the provisions of Community law and is therefore likely to encounter resistance from the Member States. In order to review the consistency of the procedure followed with the requirements of Article 58, the applicant seeks production of the Council's minutes and of the sound-recording of its discussions.

8 That attitude on the part of the applicant is founded on a failure to appreciate both the distribution of powers intended by Article 58 and the principles underlying the legislative system set up by the ECSC Treaty.

9 Under the first subparagraph of Article 58 (1), it is for the Commission to establish the existence of a manifest crisis. Should such a crisis become apparent and should the means of action provided for in Article 57 be insufficient to deal with it, Article 58 places the Commission under a duty to establish a system of production quotas. The power to take appropriate measures lies, under Article 58, with the Commission, subject to the condition that it may not act except with the "assent" of the Council.

10 In laying down that form of consultation between the Commission and the Council, Article 58 did not determine its detailed arrangements. In those circumstances, it is a matter for the two institutions to provide, by common consent and in accordance with their respective powers, for the form which their cooperation shall take. The requirements of Article 58 are thus satisfied if such cooperation culminates in the Council's assenting to the "quota system" which the Commission proposes to set up, without its being necessary to require the two institutions to examine a detailed draft decision.

11 As the Court has already pointed out in its judgment of 7 July 1982, the decision of the Commission, the preamble to which recites the Council's assent, must be presumed to have been lawfully taken. The applicant has limited itself to putting hypothetical questions concerning possible irregularities which may occur in dealings between the Commission and the Council but it has failed to adduce the slightest evidence that the Council's assent was obtained otherwise than in circumstances consistent with the requirements of Article 58. There are therefore no grounds for ordering an inquiry in that respect.

12 Lastly, as far as the requirements arising under Community law are concerned, it should be observed that the system of legal remedies laid down by the ECSC Treaty affords appropriate guarantees in this respect. Both the Council and the Member States are entitled, by virtue of Article 33 of the ECSC Treaty, to refer a decision of the Commission for review by the Court

if they consider that the Council's assent was not forthcoming in proper circumstances. It is sufficient to record that, in this case, Decision 1831/81 was not the subject of such a challenge within the period prescribed by the Treaty.

13 The submission must therefore be rejected.

2. Submission alleging failure to fulfil the duty to guarantee a minimum utilization of productive capacity

14 In this case the applicant has, in substance, reiterated the arguments which it has already set forth in Case 119/81. It asserts that the quest by the Commission for a "equitable basis" implies a duty to ensure that undertakings maintain a minimum level of employment, by fixing the quotas in such a way that every undertaking is guaranteed a utilization of its productive capacity which corresponds to the Community average. In that connection, it considers that Decision 1831/81 has caused its position to deteriorate still further as compared with the position under Decision 2794/80, owing to the fact that the new decision no longer allows for the possibility of increasing reference production in favour of those undertakings which are experiencing a utilization rate of their plant which is below the Community average, as was provided by Article 4 (3) of the previous decision, since the advantage in question was only half maintained by the effect of Article 6 (1) (b) of the new decision.

15 The applicant states that the deterioration in its position following that reduction in its quotas endangers its very existence and puts it in an "emergency situation". It takes the view that the object of Article 58 can be achieved only by a system organized in such a way as to guarantee to undertakings an appropriate utilization of their current productive capacity and not by reference to their actual production during previous periods.

16 In connection with that submission, the applicant has also pursued its challenge relative to the Commission's assessment of its productive capacity. It takes the view that the Court, in its judgment of 7 July 1982, did not give

a definitive ruling on the point, and it therefore re-asserts the inferences which it draws from the so-called "Kawasaki Report" of 1 May 1981. In these proceedings it has further referred to an expert report drawn up on 12 January 1982 by Professor Jeschar with the assistance of the firm Stein-Heurty, concerning the capacity of a walking-beam furnace built by the latter and forming part of the Bremen rolling-mill. In the applicant's opinion, the conclusion drawn by that report justifies a more favourable appraisal of the productive capacity of the plant in question. The applicant has further submitted an accountancy report by Wollert-Elmendorf KG concerning the amount of the additional losses to be incurred by the undertaking should the output of its rolling-mill be restricted.

17 Finally, the applicant argues that the provisions of Decision 1831/81 which brought about a deterioration in its position as compared with that under Decision 2794/80 lacks any statement of the reasons on which it was based, and that Decision 1831/81 is, for that reason, void on the ground of infringement of an essential procedural requirement.

18 It appears from an analysis of Decision 1831/81 that the Commission has thereby amended the basis for the determination of reference production figures as previously fixed by Decision 2794/80.

19 In the first place, Article 6 (1) of the new decision diversified the periods taken into consideration for the assessment of the reference production figure. That provision maintains the principle of the taking into account of the most favourable month of production of undertakings during the period from 1977 to 1980, but it introduces two new reference periods, namely the year 1974 and the period immediately preceding the entry into force of Decision 2794/80. In the second place, the new decision omitted the possibility of adapting reference-production figures in favour of undertakings whose utilization rate lay below the average for Community undertakings. However, the advantages granted to the undertakings involved under the system laid down by Decision 2794/80, by virtue of Article 4 (3) thereof, were retained, as to one half, by the effect of Article 6 (1) (b) of Decision 1831/81.

20 The explanations supplied in the course of the proceedings disclose that, by amending the system in that way, the Commission intended to define the basis of calculation used for determining reference production figures in a more equitable manner for all the undertakings in the Community, by dint of taking into consideration thereafter both a production period prior to the crisis and a period close to the introduction of the system of production quotas. The Commission considers that as a result of a better adjustment of the criteria underlying the determination of quotas to the actual situation of undertakings, there was no further purpose in resorting to productive capacity as a corrective of the reference production figures under the system laid down by the earlier decision. While retaining, for those undertakings which benefited from the corrective, part of the advantage thereby obtained, the Commission attenuated its effects by virtue of the arithmetical mean of the two factors taken into consideration by Article 6 (1) of Decision 1831/81.

21 In that context the Commission explains that, in the light of experience, it appeared that the effect of the corrective under Article 4 (3) of Decision 2794/80 was to confer an unjustified advantage on undertakings characterized by an operating rate below the Community average, to the detriment of the other undertakings. It notes that the applicant derived greater benefit from that provision than any other undertaking. The objective of the new decision was precisely to lessen that advantage in order to do justice to protests from other less-favoured undertakings. The Commission denies that the treatment of the applicant under the new decision may be described as causing its previous position to "deteriorate"; the new decision means merely partial withdrawal of an unjustified advantage.

22 The Commission considers that, by re-defining the detailed rules governing the calculation of production quotas, it has moved closer to establishing an "equitable basis" for all Community undertakings. In that connection it emphasizes, whilst recalling the reasoning set out in Case 119/81, that a system of production quotas set up by virtue of Article 58 must necessarily be based on undertakings' actual production and not on their productive capacity. An examination of capacity affords no indication as to actual output and is therefore not capable of furnishing a useful criterion for the purpose of adapting that output to the decline in demand.

23 As the Court has observed in its judgment of 7 July 1982, it cannot reasonably be denied that the Commission's choice of the criterion of actual production accords with Article 58 (2) of the Treaty, which requires that quotas shall be determined on an "equitable basis". The judgment stressed that, unlike the criterion of productive capacity, the appraisal of which is by its nature uncertain, reference to undertakings' actual production has the double advantage of affording an objective basis of appraisal and of enabling total production to be reduced without, however, altering the various positions of undertakings on the market.

24 By reducing the advantage accruing to certain undertakings, to the detriment of others, from taking into consideration an operating rate below the Community average, and in endeavouring thereby to distribute more appropriately the burdens arising from the crisis amongst the undertakings of the Community as a whole, the Commission has not exeeded the limits of the discretion conferred on it by Article 58 when it provides that production quotas must be determined "on an equitable basis".

25 It follows from the foregoing that the applicant, in demanding that the system of production quotas be organized in such a way that undertakings may find in it a guarantee of a proper utilization of their productive capacity, fails to appreciate the true purpose of Article 58 of the Treaty, which 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.

26 Whilst it is true that measures adopted under Article 58 must enable the Community's steel industry as a whole to defend itself, on a collective basis and by a cooperative effort, against the consequences of crises occurring when demand declines, the article in no way places the Commission under a duty to guarantee to any given undertaking, to the detriment of others within the Community, such minimum production as that undertaking regards as appropriate in accordance with its own criteria of profitability and development, as the Court has already explained in its judgment of 7 July 1982.

27 As to the complaint made by the applicant concerning the determination by the Commission of the productive capacity of its business in the context of Article 4 (3) of Decision 2794/80, reference should be made to the reasoning of the judgment of 7 July 1982 which, following a detailed analysis of the history of that issue, unequivocally dismissed that complaint. It is sufficient to recall that the applicant had for years been supplying incorrect information on the productive capacity of its plants and that it was as a result of a review carried out on the undertaking's premises that the Commission agreed to accept a revised statement from the applicant, on which subsequent decisions on the determination of production quotas have thenceforth been based.

28 In these proceedings, the applicant has failed to supply any fresh evidence enabling that appraisal to be reconsidered. By the production of the Jeschar expert report, based on a mathematical simulation, the applicant is endeavouring to rectify one aspect of the report made by the Centre de Recherches Métallurgiques and the Kawasaki Steel Corporation, which the Court has, in any event, held to be devoid of probative value. As to the Wollert-Elmendorf opinion, it is an accountancy report whose object is to evaluate the financial consequences of fixing the production quotas allocated to the undertaking for the third quarter of 1981 as opposed to a hypothetical case advanced by the applicant consisting of allocating quotas based on a hypothetical output corresponding to the average utilization of capacity by Community undertakings. That accountancy report, whose object is to evaluate what is financially at stake in the litigation between the applicant and the Commission, is based on an assessment of productive capacity (459 000 tonnes per month = 5 508 000 tonnes per annum) which the Court has already expressly rejected in its judgment of 7 July 1982. The report therefore contributes no fresh evidence in relation to the question raised by the applicant on the subject of its productive capacity.

29 That issue must therefore be regarded as having been definitively settled by the judgment of 7 July 1982.

30 Lastly, as far as concerns the objection alleging a defective statement of the reasons on which Decision 1831/81 is based, the applicant takes the view that the reasons of the Commission did not find appropriate expression in

the preamble to the decision, which restricts itself, on the disputed point, to affirming that the Commission has taken account "of the experience gained in managing the system set up by" Decision 2794/80. According to the applicant, the new decision is therefore void for infringement of an essential procedural requirement.

31 It should be observed in this connection, first, that the Commission did in fact show, in the paragraph of the preamble quoted, the reasons for what appears to be the essential component of the new decision, namely the adjustment of the reference periods to accord with a more suitable definition of the basis for calculating the quotas, by taking into consideration periods of production more representative than those previously adopted. That reasoning is such as to give the undertakings concerned sufficiently precise information regarding the objective pursued by the Commission. Thus the applicant's criticism really relates only to the Commission's failure to state its reasons for the partial abandonment of a corrective factor — namely the reference to productive capacity — contained in Decision 2794/80.

32 According to the case-law of the Court (see, most recently, the judgment of 28 October 1982, *Lion and Loiret & Haentjens and Others* v *FIRS,* Joined Cases 292 and 293/81, [1982] ECR 3887), the statement of the reasons on which Community measures are based must be appropriate to the nature of the measure in question: it must show clearly and unequivocally the reasoning of the Community authority which issued the measure, so as to allow those concerned to take cognizance of the justification for the measure adopted and to enable the Court to exercise its powers of review. In the case of a measure in the nature of a regulation, such as the general decision in dispute, the statement of reasons cannot be required to specify the often very numerous and complex matters of law or of fact constituting the subject-matter of such instruments, as long as those matters fall within the framework of the whole of which they form part.

33 Such is undeniably the case with the provisions at issue, the scope of which might have been ascertained without difficulty by the applicant by a comparison of the provisions of the two successive decisions. It would therefore be wrong to go so far as to demand that the Commission should devote a specific explanation to a detail of the arrangements, which may be

regarded as the attenuated transfer to a new decision of a corrective factor, the basis and justification for which may be found in Decision 2794/80.

34 It follows from the foregoing that the submission must be rejected.

3. Submission alleging the failure by the Commission to take account of the effects of unlawful subsidies

35 In support of this submission the applicant has repeated without modification the arguments which it put forward in its action in Case 119/81.

36 It will be recalled that the Court, in its judgment of 7 July 1982, acknowledged that the criticisms put forward by the applicant against the failure of the Commission to take action in connection with public subsidies which, in some Member States, have distorted the conditions of production and competition in the steel market were well founded. However, it should further be recalled that, in the same judgment, the Court in the first place acknowledged that the Commission was entitled, in laying down the system of production quotas, to take account of the effect of subsidies the illegality of which has been established in conformity with the appropriate procedures; but that, in the second place, the Court held that it was nevertheless impossible to expect the measures referred to in Article 58, which are designed to deal with a crisis, to be used to counteract the effect of illegal aids granted by Member States.

37 Since no fresh argument has been adduced in this respect, it must be concluded that this submission also must be rejected.

4. Submission alleging the substitution by the Commission of "delivery quotas" in the common market for production quotas, and the setting of export quotas

38 The applicant takes the view that the question of "delivery quotas" which was previously the subject of the action in Case 119/81, was not resolved by the judgment of 7 July 1982 inasmuch as the Court held therein that no such concept played any part in the determination of the production quotas for the second quarter of 1981. It therefore requests that that complex of questions be reconsidered and it argues, in substance, that Article 58 empowered the Commission to take action with regard only to the production of steel and not to its marketing, whether in the common market

or on export markets. The ECSC Treaty as a whole does not support the inference of "implied powers" enabling the Commission to take action with regard to the delivery of goods.

39 As to the distribution of deliveries between the domestic market and non-member countries, the applicant takes the view that Article 58 does not empower the Commission to regulate external trade or, in particular, to curtail exports. Its view is that, under the scheme of the ECSC Treaty, commercial policy falls within the competence of the Member States. The applicant explains that the Commission was empowered to fix production quotas only at the level of domestic demand, and to permit undertakings to deduct from the output to be taken into account, for the calculation of production quotas, those quantities proven to have been exported to non-member countries.

40 As the questions raised are the subject, in Decision 1831/81, of more explicit rules than those in the previous decision, it is appropriate to consider once more the applicant's arguments in the light of the new provisions.

41 Under Article 5 of Decision 1831/81, the Commission is to fix each quarter for each undertaking its production quota and the part of such quotas which may be delivered in the common market. The detailed rules for that distribution are dealt with in Articles 8 to 11; under Article 11 (5), deliveries in respect of which an undertaking does not show proof of export outside the territory of the Community are to be deemed to have been made within the common market.

42 It follows from those provisions as a whole that the Commission is to fix for each undertaking a comprehensive production quota within which it specifies that part which may be disposed of within the common market; the remainder may be delivered to the markets of non-member countries. Article 9 of the decision provides for separate abatement rates for establishing the production quotas and the part thereof which may be delivered within the common market. The applicable abatement rates for both the fourth quarter of 1981 and the first quarter of 1982 were fixed, pursuant to that provision, by Decisions 2979/81 of 15 October 1981 (Official Journal L 298, p. 11) and 3328/81 of 20 November 1981 (Official Journal L 334, p. 34), respectively.

43 In its judgment of 7 July 1982, the Court stressed that, owing to the very nature of the machinery envisaged 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. As the Commission has rightly explained, the laying down of production quotas would be ineffective if undertakings were to remain at liberty to export quantities without any supervision to non-member countries, since the effect of such exports might be not only to compromise the interests of the Community in those markets but also to deflect some of the goods back to the domestic market and to jeopardize its equilibrium.

44 The judgment of 7 July 1982 also emphasized that it lies within the discretion of the Commission to take trade with non-member countries into account in the context of the measures to be adopted in pursuance of Article 58. In that respect it is, in fact, for the Commission to take account both of the needs of the common market itself and of the interests of the Community in its relations with non-member countries. Whilst it is true that Article 58 empowers the Commission, in periods of manifest crisis, to take action with regard to production without regard to trade with non-member countries, the provision cannot be interpreted as meaning that it permits no more than the allocation to every undertaking of a comprehensive production quota which may be disposed of either on the domestic market or on the market of non-member countries.

45 It follows that the Commission did not exceed the powers which it derives from Article 58 when, in the contested decision, it fixed separate quarterly reference production figures and reference quantities for the application of the abatement rates governing the determination of the production quota and of that part of production which might be delivered on the common market.

46 That submission must therefore also be rejected.

Costs

47 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. As the applicant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. Dismisses the applications;

2. Orders the applicant to pay the costs.

O'Keeffe Pescatore

Bosco Koopmans Bahlmann

Delivered in open court in Luxembourg on 11 May 1983.

P. Heim
Registrar

A. O'Keeffe
President of the Fourth Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 23 FEBRUARY 1983 [1]

Mr President,
Members of the Court,

During the period in which Decision 1831/81 of 24 June 1981 (Official Journal L 180 of 1 July 1981, p. 1 et seq.), Klöckner-Werke AG, which has contested the notification of quotas for the third quarter of 1981 in Case 244/81, [2] received similar notifications in respect of the fourth quarter of 1981 and the first two quarters of 1982.

There are three notices at issue, the first dated 26 October 1981 and based — as far as the abatement rates applicable to the fourth quarter of 1981 are concerned — on Decision 2979/81 (Official Journal L 298 of 17 October 1981, p. 11), the second dated 4 December 1981 and based on Decision 3328/81, which governed the first quarter of 1982

1 — Translated from the German.

2 — Case 244/81 — *Klockner-Werke AG* v *Commission of the European Communities.*