establishing for undertakings in the iron and steel industry a monitoring system and a new system of production quotas in respect of certain products and Commission Decision No 1698/82/ECSC of 30 June 1982 adjusting the abatement rates for Category V products for the third quarter of 1982 in respect of certain undertakings;

2. Declares that the individual decisions addressed by the Commission on 30 March and 20 July 1982 to Thyssen Aktiengesellschaft concerning its reference-production figures and production quotas for the second and third quarters of 1982 are void in so far as they concern the abatement rates for Category V;

3. Orders the Commission to pay the costs.

Mertens de Wilmars Koopmans Bahlmann

Galmot Pescatore Mackenzie Stuart O'Keeffe

Bosco Due Everling Kakouris

Delivered in open court in Luxembourg on 21 February 1984.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 22 NOVEMBER 1983 [1]

Mr President,
Members of the Court,

1. Introduction

At the hearing Counsel for the applicants in Joined Cases 140 and 221/82 Walzstahl-Vereinigung) and 146 and 226/82 (Thyssen AG) began his address to the Court by stating that these actions are directed principally against Commission Decisions No 533/82/ECSC and No 1698/82/ECSC. Those decisions granted single-product undertakings producing

1 — Translated from the Dutch.

concrete reinforcing bars a production quota which was 5% higher than that allocated to "integrated" undertakings, which manufacture other kinds of steel besides concrete reinforcing bars. [1] The production of concrete reinforcing bars by the Bresciani, in particular, which are small and medium-sized steel undertakings located in northern Italy, was less severely curtailed by those decisions than that of the "integrated" undertakings. For the details I need merely refer at this stage to the Report for the Hearing.

The statement I have just quoted is, I think, correct in itself but it must be added straightaway that only the applications of the Walzstahl-Vereinigung directly seek the annulment of the two decisions referred to. Thyssen's applications, on the other hand, primarily seek the annulment of the communications of 30 March and 20 July 1982 informing it of its reference-production figures and production quotas for the second and third quarters of 1982 in so far as they concern the abatement rate for Category V (concrete reinforcing bars); the Commission's general implementing decisions, on the basis of which those quotas are fixed, are only indirectly involved in Thyssen's action. Thyssen's allegation that the Commission discriminated against it is based on the two general implementing decisions, which Thyssen maintains are illegal.

If, however, we examine the applicant's various complaints, which are clearly summarized in the Report for the Hearing, it becomes clear that in essence they all concern the allegedly discriminatory nature of the two general decisions. After a brief analysis in Part 2 of the objections of inadmissibility raised by the Commission I shall devote the main part of my opinion (Part 3) to an examination of the applicant's complaints regarding the general implementing decisions in question, namely Decision No 533/82/ECSC and No 1698/82/ECSC. In the fourth part of my opinion I shall then briefly examine Thyssen's specific claims regarding the quotas allocated to it. In the final part of my opinion I shall summarize the conclusions reached in the earlier parts.

2. Admissibility of the actions

The Commission considers that the actions brought by the Walzstahl-Vereinigung are inadmissible because they are based solely on the second paragraph of Article 33 of the ECSC Treaty, which allows proceedings to be brought against general decisions addressed to associations of undertakings only on the ground of a misuse of powers affecting them. The Commission maintains first of all that it follows from that provision that all the association's submissions except its allegation of a misuse of powers must be considered inadmissible. It contends secondly that the association is not representative of German producers of concrete reinforcing bars. Only six of the association's members subject to the quota system produce reinforcing bars and the production of those six accounts for only 3% of the total steel production of the association's members, whilst 40% of all concrete reinforcing bars produced in Germany are produced by undertakings which are not members of the association.

1 — In this opinion I have adopted the terms "single-product undertakings" and "integrated undertakings" used by the Commission. It would in fact be more accurate in this context to describe the second group of undertakings as producers with a diversified production programme.

The Commission considers Thyssen's actions inadmissible in so far as its submissions are directed solely against Decisions No 533/82 and No 1698/82.

My comments on those three objections of inadmissibility are as follows.

The actions brought by the Walzstahl-Vereinigung for the annulment of the two general decisions may indeed be regarded as admissible only in so far as the association considers the decisions to involve a misuse of powers affecting it. The extent to which the association has actually established a misuse of powers in its submissions can only be determined when their substance is examined. All that we may immediately concede to the Commission is that, in view of the clear wording of the first two paragraphs of Article 33 on this point, the submissions alleging lack of competence, breach of the Treaty or of provisions relating to its application and infringement of essential procedural requirements through a failure to state reasons cannot *per se* lead to the conclusion that the Commission committed a misuse of powers. It is clear from its application, however, that those submissions are not pleaded by the association as grounds for annulment but solely in support of a submission of misuse of powers. None of its submissions can therefore be declared inadmissible at the outset.

As to whether the Walzstahl-Vereinigung is representative, the first point to be noted is that the Commission does not dispute that it is an association within the meaning of Article 48 of the Treaty. The second paragraph of Article 33 lays down no other requirements as regards admissibility. The *quantitative criteria* which the Commission wishes to apply in order to determine the association's *interest* in bringing the proceedings, thus following Mr Advocate General Lagrange's opinion in Case 13/75 (*Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *High Authority* [1957 and 1958] ECR 265), were rejected without hesitation by the Court in its judgment in that case. It was held to be sufficient that "the contested provisions (of Decision No 2/57) are capable of affecting certain, even though perhaps divergent, interests entrusted to the applicant" (*loc. cit.* page 276). This objection of inadmissibility must therefore be rejected.

The Commission claims that one of the submissions advanced in Thyssen's applications is inadmissible because no relationship exists between Decisions No 532/82 and No 1697/82 (on which Thyssen's quotas are based) and Decision No 533/82 and No 1698/82 (regulating the position of the single-product undertakings of such a nature as to cause the alleged illegality of the latter two decisions to affect the legality of the former two decisions. In my view, that objection will have to be rejected because only an examination of the substance can reveal whether or not such a relationship exists. At this stage, however, it seems reasonable to assume that if the higher quotas allocated to the single-product undertakings are declared illegal and the restriction on total production is unchanged, there will automatically be a certain increase in the lower quotas of the integrated steel undertakings.

Finally, I would point out that the joinder of the four cases means of course that inadmissible submissions of one applicant may to some extent be compensated for in my analysis by admissible submissions of the other applicant and *vice versa*. In the next part of my opinion I shall therefore examine all the submissions. So far as they have not already been answered affirmatively, the questions of admissibility rest chiefly of importance for the conclusions to be drawn from this examination as regards the different claims of both applicants for declarations that Decisions Nos 533/82 and 1698/82 are void and that the relevant parts of the individual decisions concerning Thyssen are void.

3. Examination of the submissions advanced with regard to the contested general decisions

3.1. The submissions pleaded against Decisions No 533/82 and No 1698/82 are as follows:

(a) Breach of the principle that Article 58 should have a neutral effect on competition (both applicants);

(b) Lack of any legal basis (as an objection of lack of competence this submission is admissible only in Thyssen's case; however, it has in fact been put forward by the Walzstahl-Vereinigung as evidence of a misuse of power);

(c) Conflict with the aims of the ECSC Treaty (both applicants);

(d) Breach of the prohibition of discrimination contained in Article 4 of the Treaty (both applicants); and

(e) Breach of essential procedural requirements (this submission is admissible as such only as far as Thyssen's applications are concerned).

Before examining each of those submissions in turn I shall briefly analyse the two general decisions and their economic and legal context. For a more detailed summary of the background I refer to the Report for the Hearing.

3.2. The contested general decisions and their economic context

(a) Commission Decision No 533/82/ECSC is based upon Article 16 (1) of Commission Decision No 1831/81/ECSC, ad amended by Decision No 2804/81/ECSC. Commission Decision No 1698/82/ECSC is based upon Article 18 (1) of Decision No 1696/82/ECSC. I shall confine my analysis mainly to the first of the two contested decisions. However, I shall also briefly state some new reasons which led to the adoption of the second decision.

In paragraph 2 of the preamble to Commission Decision No 533/82 it is stated, so far as is here material, that because of both the continuing reduction in demand for concrete reinforcing bars caused by the worsening of the slump in the construction industry and the high level of stocks very high abatement rates had to be imposed; the decline in

demand was accompanied by a slump in prices, which in certain regions of the Community had fallen well below the Commission's guide prices.

In paragraph 3 of the preamble it is pointed out that in the Community there are a substantial number of small and medium-sized undertakings whose steel production consists almost entirely of products in Categories IV, V and VI, of which concrete reinforcing bars form a considerable part; those undertakings are stated to be clearly different from undertakings that also produce several other categories of products and can consequently benefit from the more favourable market conditions for their other products and from undertakings that produce other categories of products only.

In paragraph 4 it is stated that in the preamble to Decision No 1831/81/ECSC the Commission recognized that the quota system could create exceptional difficulties for certain undertakings both because of the size of their plant and because of the dependence on a limited range of products and for that reason Article 14, which enabled undertakings' reference production to be adjusted under certain conditions, was included in that decision. It was considered that in view of the extremely high abatement rate for concrete reinforcing bars for the second quarter of 1982 the quota system would create exceptional difficulties for the undertakings referred to in paragraph 3 of the preamble, so that less stringent quotas had to be established for those undertakings.

In paragraph 5 of the preamble the reason for the expediency of adopting a general decision is stated to be the large number of undertakings coming within the terms of paragraph 3.

Finally, in paragraph 6 it is stated that the worsening of the slump in the construction industry and the increased downturn in demand and prices for concrete reinforcing bars constitute a radical change in the steel market within the meaning of Article 16 (1) of Decision No 1831/81.

The decision itself then inserts an Article 14b after Article 14a into Decision No 1831/81. The new article provides that for producers whose total production of the products referred to in Article 1 of Decision No 1831/81 did not exceed 700 000 tonnes in 1981 and whose production of products in Categories IV, V and VI accounts for at least 90% of their total production, the abatement rates laid down in Article 1 of Decision No 532/82 regarding the production and delivery on the Common Market for concrete reinforcing bars is to be reduced by five percentage points for the second quarter of 1982 if production of that category of steel represents at least 30% of production of Categories IV, V and VI.

The other contested decision, Commission Decision No 1698/82/ECSC, maintained that derogation for the third quarter of 1982; it introduced little that was essentially new so far as the present cases are concerned. The only point I would make here is that paragraph 3 of the preamble to that decision expressly states that not all the undertakings in question met the requirements for the granting of special treatment to

individual undertakings under Article 14 of the relevant basic regulation and that in paragraph 4 it is expressly stated that, although in accordance with the principle of Community solidarity the producers of concrete reinforcing bars accorded the special treatment should participate in the reduction in production, this requirement should be relaxed to the extent necessary to ensure that their existence is not lastingly jeopardized.

(b) Article 16 of Decision No 1831/81/ECSC and Article 18 of Decision No 1696/82/ECSC empower the Commission to carry out the necessary adjustments by general decision if radical changes occur in the steel market. As I pointed out, the contested general decisions constitute an application of those provisions.

(c) The production quotas of the remaining producers of concrete reinforcing bars (including the members of the Walzstahl-Vereinigung that produce concrete reinforcing bars and also Thyssen AG) are based upon Decisions No 532/82 and No 1697/82/ECSC. Those decisions fix, on the basis of Decisions No 1831/81 and No 1696/82, the abatement rates for the second and third quarters of 1982 respectively for the establishment of the production quotas and the proportion of production which may be delivered in the common market for *all* categories of steel covered by the quota system. In the case of concrete reinforcing bars, Decision No 532/82 fixed the abatement rate for the second quarter at 38% for production quotas and at 41 % for delivery quotas. For the third quarter Decision No 1697/82/ECSC fixed the rates at respectively 47 and 50%. For most categories of steel, particularly Categories Ia, Ib, Ic and VI, the abatement rates are considerably lower, which reflects the seriousness of the crisis in the reinforcing bar sector. As I pointed out earlier, the aforementioned abatement rates for undertakings that produce only concrete reinforcing bars were again reduced by five percentage points by Decisions No 533/82 and No 1698/82.

(d) As regards the economic background of the abatement rates for the production and delivery of concrete reinforcing bars, I have already referred to the preambles to Decisions No 533/82 and No 1698/82. It is clear from those preambles that the slump in the construction industry led to an above-average decline in the demand for concrete reinforcing bars and to an above-average fall in prices, especially in certain regions of the Community. The decline in demand for concrete reinforcing bars is reflected with particular clarity in the table on page 9 of the Report for the Hearing in which the changes in the quotas for the various categories of steel are set out. As regards the fall in prices and its consequences, I refer to pages 14 and 15 of the Report for the Hearing. That this signified a radical change in the steel market within the meaning of Article 16 of Decision No 1831/81 and Article 18 of Decision No 1696/82 is implicitly accepted on page 9 of the Walzstahl-Vereinigung's application.

As far as the economic background is concerned, a further material factor is that most "integrated" undertakings use a different, more costly method to produce concrete reinforcing bars. This makes it possible to use production

facilities to produce other kinds of steel and also to use raw materials other than scrap alone to make concrete reinforcing bars. Thyssen AG, however, uses the same production method as the single-product undertakings.

3.3 Examination of the individual submissions

I shall now examine in the order I indicated earlier submissions advanced by the applicants in support of their actions.

(a) The alleged breach of the principle that Article 58 should have a neutral effect on competition

In their argument supporting their first submission the applicants deduce from the Court's previous decisions [1] that the application of Article 58 of the ECSC must have a neutral effect on competition and not favour individual groups of undertakings. Their contention is that by favouring single-product undertakings Decisions No 533 and No 1698/82 involve serious interference with the mechanism of the market in concrete reinforcing bars and disturb the normal balance of that market. That balance requires that the market risks should increase for undertakings which, like the single-product undertakings have taken few investment risks by limiting their production to a single product. Because the restrictions on those undertakings' production are 5% lower, their — already considerable — market share is permanently increased, which is contrary to the normal principles of competition [2]. In the applicant's submission, such a measure clearly exceeds the margin of discretion which the Commission has when applying Article 58 of the ECSC Treaty, is incompatible with the principles underlying Article 58 and constitutes a misuse of power.

In considering that submission it must, in accordance with paragraphs 82 and 83 of the *Valsabbia* judgment cited above, be regarded as axiomatic that by its nature a quota system based on Article 58 invariably impairs the normal working of the market. However, according to the interpretation of Article 58 which the Court gave in that judgment, the principles outlined in Articles 2, 3 and 4 of the Treaty must also be taken into account. I would understand that interpretation as meaning that the measures must not interfere with the normal market mechanism any further than is necessary (Article 2), that a

1 — Joined Cases 275/80 and 24/81, *Krupp Stahl AG* v *Commission*, [1981] ECR 2498; Case 154/78 etc., *Valsabbia and Others* v *Commission*, [1980] ECR 907; Case 14/81, *Alpha Steel Limited* v *Commission* [1982] ECR 749; and Joined Cases 39, 43, 85 and 88/81, *Halyvourgiki* v *Commission*, [1982] ECR 593. For the arguments which the Walzstahl-Vereinigung bases *inter alia* on those decisions, I refer in particular to pages 4 to 9 of its application.

2 — At the hearing lengthy argument was devoted to the question of how much the single-product undertakings' market share was increased. According to my calculations, the increase is less than the 5% alleged by the applicants. If we assume that in the relevant reference period those undertakings had a market share of 70% and thus produced 70 production units, under the decision their production will be 33% less, which is 46.9 production units. The other undertakings (which originally had a market share of 30%) may produce 18.6 units after application of the higher abatement rate of 38%. Of the resultant total possible production of 65.5 units the single-product undertakings' share is 71.6% and the other producers' share 28.4%. The single-product undertakings' gain in relation to their starting position is thus no more than 3.2%. Owing to the individual quota increases granted under Article 14 of the decision, the gain resulting from the contested decision is, of course, still lower.

reasonable balance should be struck between the various aims set forth in Article 3, which are not always compatible (aims (c), (d), (e) and (g) seem to me particularly relevant in this case), and that in particular discrimination between producers must be avoided (Article 4 (b)). However, another relevant point is that, according to Article 58, the aforesaid principles must be taken into account in the determination of the quotas *on an equitable basis.* This principle of fairness may therefore go further than the principles laid down in Articles 2, 3 and 4.

The principle of proportionality which I deduce from Article 2 plays a large part of course in the decisions of the Court, particularly in cases in which exceptions to the fundamental principles of a system based upon the free movement of goods and undistorted competition are considered. The principle has been taken into account in various ways in the quota systems. The first quota system consisted, of course, in the application of an abatement rate that was the same for all producers of specific types of steel to their best production results in a specified reference period. Various adjustments were then made to take account of restructuring, investment and voluntary production cuts consistent with the interests of the Community. Save for those adjustments, it was however assumed that the relative market shares of undertakings would be frozen. It cannot be denied that the contested decisions depart from that assumption and increase the market share of the single-product undertakings at the expense of the integrated undertakings that also produce concrete reinforcing bars.

In the later general decisions the results of the market mechanism are further taken into account by taking into account not only production in the twelve best months of the basis period but also production since the introduction of the quota system. I refer here *inter alia* to Article 6 (1) (b) of Decision No 1831/81 and Articles 4 (5), 6 and 7 of Decision No 1696/82.

This lessening of the quota system's rigidifying effect on the market is important in connection with the possibilities, available ever since the introduction of Article 8 of Decision No 2794/80, of exceeding quotas to a limited extent, carrying forward a partially used quota to the next quarter and of buying, exchanging or selling quotas. [1] It is mainly by that approach that the Commission decisions have taken into account the principle of proportionality which I deduce from Article 2 and from the Court's judgments concerning exceptions to the system of undistorted competition. Hence there remains room in which the market mechanism may operate, so long as this is compatible with the aim of restricting the total production of the various kinds of steel. To that extent the general decisions themselves support the applicants' contention that in principle the application of Article 58 can and must be neutral in its effect on competition.

1 — In a lecture delivered in Ghent on 12 December 1980 the President of the Court cited Article 8 of Decision No. 2794/80/ECSC as "a typical example" of State intervention consistent with the nature of a real market. See J. Mertens de Wilmars, Recht voor morgen, p. 77, Note 5 (Kluwer-Antwerp, 1983).

The principles contained in Articles 3 and 4 of the Treaty are best examined in connection with the applicants' third and fourth submissions, which specifically relate to those principles. In that context I shall investigate in particular whether in this case the aims of Article 3 may justify a departure from the fundamental principle of an unfettered market mechanism in so far as that still plays an important part in the general scheme of Decisions No 1831/81 and No 1696/82.

Besides, it is only with reference to all the submissions advanced that I will be able to examine the extent to which the contested decisions may be justified by the general principle of equitableness laid down in Article 58. That this constitutes an independent principle is borne out by the fact that Decisions No 2794/80, No 1831/81 and No 1696/82 all contain specific provisions for granting equitable relief to individual undertakings experiencing exceptional difficulties. The question which then arises in this case, however, is whether Article 16 of Decision No 1831/81 or Article 18 of Decision No 1696/82 provides a sufficient basis for the granting of equitable relief collectively to a whole group, thus justifying the contested decisions.

For the moment I must confine myself to the conclusion that, although the contested decisions do depart from the principle that production quotas should have a neutral effect on competition, as I have expounded it with reference to the relevant provisions, the question whether that departure is contrary to the principle of proportionality which I have deduced from the Treaty and from decisions of the Court depends on a close examination of the other submissions. Therefore, though sound, the first submission cannot at this stage be said to justify a conclusion that powers were misused.

(b) The allegation that the contested general decisions have no legal basis

The applicants' second submission is that the contested decisions have no legal basis either in Article 58 of the ECSC Treaty or in Articles 14 or 16 of Decision No 1831/81 or Articles 14 or 18 of Decision No 1696/82. In view of the general ground of action on which the Walzstahl-Vereinigung primarily relies, namely misuse of powers, this submission must in my view, at least as far as this applicant is concerned, be understood as a contention that in this case the Commission used its powers under Article 16 of Decision No 1831/81 or Article 18 of Decision No 1696/82 for a purpose other than that for which they were intended or may be used. The misuse of powers is perceived to be the fact that the Commission favoured a specific production structure and a specific region when there is no basis for that in either Article 58 or Articles 16 and 18 of the two general decisions. It is contended that the Commission in fact used those articles in this case to escape the restrictive conditions governing the application of Article 14, the hardship clause, of the general decisions. Lastly, it is contended

that the Commission's arguments are self-contradictory since in the second quarter of 1982 an abatement rate of 35% had already been regarded as a threat to the very existence of the single-product undertaking, whereas in the third quarter, despite the further slump in the market in concrete reinforcing bars, an abatement rate of 42% was considered sufficient to avert that threat.

In my view, we should begin our consideration of this submission with an interpretation of Articles 16 and 18 of the general decisions. As I have already pointed out, those provisions enable the necessary adjustments to be made by general decision if radical changes occur in the steel market.

The Court will recall that at the hearing counsel for the Commission, in answer to a question from the Judge-Rapporteur, gave an interesting account of the Commission's interpretation of the basic requirement of "radical changes in the steel market" laid down in Articles 16 and 18. In its view, contrary to normal usage, the expression "steel market" must primarily be understood as meaning "that part of the steel market covered by the quota system", thus not a completely free market. Consequently, the articles in question must in its view be construed with reference to the aims of the quota system and account must be taken of the situation in which specific groups of producers — in this case the single-product undertakings — find themselves as a result of the quota system. In this case the quota system deprived single-product undertakings of most of the competitive advantage which they normally have (owing, I would add, to their lower production costs). In addition, it is agreed, account should be taken of the fact that owing to the scheme and purpose of the quota system the same quotas affect structurally different undertakings in quite different ways. The Commission must therefore from time to time carry out certain adjustments in order to restore the desired balance. On this last point counsel for the Commission drew a not entirely appropriate comparison with Noah's Ark, in which the undertakings to be rescued are all accommodated but whose captain must change course from time to time. I say not entirely appropriate because this is not a case of changing course in a way that has the same effect on all the undertakings to be rescued but of creating more space *inside* the Ark for a specific group of endangered undertakings.

Quite irrespective of that bold comparison, however, I consider the interpretation that the Commission thus appears to place on the expression "radical changes in the steel market" unacceptable. In the first place it is too far removed from the wording of the provisions cited. It is certainly not without good reason that the basic precondition for intervention laid down in Articles 16 and 18 is formulated quite differently from Article 14 of the decisions in question. Secondly, I think that such an artificial interpretation, in which the expression "radical changes in the steel market" is in fact replaced by the requirement of "drastic consequences of the quota system for certain groups of undertakings on the steel market" and thus by a sort of general equitable

provision similar to the individual hardship provision of Article 14, is unnecessary in order to arrive at a satisfactory interpretation of the articles in question. Thirdly, the preamble to the contested decisions, in my view, affords sufficient support for a more plausible interpretation of the articles.

I have already pointed out that the basic decisions by no means completely prevent the operation of the market mechanism even on the supply side. I will now add that by its nature the quota system does not affect, or hardly affects, growth on the demand side of the market. Paragraph 2 of the preamble to Decision No 533/82 expressly cites as the reasons for the intervention the considerable downturn in *demand* for concrete reinforcing bars, the increase in stocks and the considerable fall in prices. I consider that such reasons are sufficient to satisfy the requirement of "radical changes in the steel market". In view of that conclusion alone I believe that there can be no question of the Commission's having acted *without authority* in adopting the contested decisions.

The other reasons for intervening given by counsel for the Commission are in my view at most grounds for arranging the adjustment measures adopted in a certain way. Articles 16 and 18 of the relevant general implementing decisions merely provide in this regard that the adjustments must be necessary and this requirement of necessity must naturally be primarily related to the radical changes found to exist on the steel market. In addition, the adjustments must naturally take into account the general aims of Article 58, including the prohibition of discrimination and the principle of equitableness and must not be manifestly contrary to the quota system as a whole.

I shall consider whether the contested decisions are consistent with the aims and principles mentioned in Article 58 when I come to discuss the applicants' third and fourth submissions. At this stage, therefore, I shall merely analyse the contested decisions with reference to the scheme of the general quota systems. Paragraph 4 of the preamble to Decision No 533/82 makes it clear in this regard that in this case the Commission did indeed use its powers under Article 16 of the general decision in order to give preferential treatment, on equitable grounds, to an entire group of undertakings which had encountered exceptional difficulties owing to the market situation. Since in this connection the Commission refers *inter alia* to the passage in the preamble to the general decision which, in the Commission's own submission, relates solely to the possibility afforded by Article 14 of making exceptions in individual cases, one may ask whether Article 16 was used for a purpose for which it was clearly not intended. In the same paragraph of the preamble the expression "radical changes in the steel market" gives way to an assertion that "the system of quotas will clearly create exceptional difficulties for the undertakings referred to in point 3 above". I have already commented that I regard such a replacement of the

criterion in Article 16 by an essentially different criterion as unacceptable. I therefore agree with the applicants that the reason given does appear to indicate that Article 16 was clearly used for purposes other than those for which it was intended, namely in order to evade the restrictive conditions of Article 14 with regard to undertakings in exceptional difficulties. In this regard it is, as I have already pointed out, also relevant that, in contrast to Article 16, Article 14 clearly links the exceptional difficulties from which it provides relief to the quota system as the cause and not to changes in the market situation. Nevertheless, I would still not conclude from that statement of reasons in the first contested decision or from paragraph 3 of the preamble to the second contested decision, which is to the same effect, that the Commission has misused its powers. I have in fact already argued with reference to the interpretation which the Commission places on the basic requirement of Articles 16 and 18 of the relevant general decisions, which I consider unacceptable, that in elaborating the adjustments necessitated by market developments and not by the quota system the Commission can and must in particular take into account the general aims of Article 58 and the principle of equitableness laid down in that article. I must therefore defer a definitive opinion on the question whether the contested decisions amount to a misuse of powers until I have considered the remaining submissions.

(c) The submission that the contested decisions are contrary to the basic aims of the ECSC Treaty

In their third submission the applicants argue that the decisions in question, which are directly addressed to single-product undertakings producing concrete reinforcing bars, are contrary to the basic aims of the ECSC Treaty, as laid down in the second paragraph of Article 2 and in Article 3 (d) and (g) of that Treaty, and thus constitute a misuse of power. They contend that it follows from those provisions that dynamic conduct, enabling an undertaking to take account of market developments and to adjust its production to demand, must be judged positively. Yet, they argue, the contested decisions favour precisely those undertakings which, despite the general structural crisis which has affected the market in concrete reinforcing bars for years, have concentrated exclusively on the production of concrete reinforcing bars.

In my view, that submission must be rejected. In its defence the Commission rightly pointed out, with regard to the basic aims of Articles 2 and 3, that it cannot, particularly in periods of crisis, achieve all the aims of the ECSC Treaty simultaneously. In this connection it may also be recalled, as the Court did in paragraph 21 of its judgment in Case 276/80 *(Padana* v *Commission* [1982] ECR 517), that "it is not certain that all the objectives of the Treaty can be simultaneously pursued in their entirety and in all circumstances; it is the task of the Commission to effect a permanent compromise between those different objectives."

I have already extensively considered, when examining the applicant's first submission, the way in which the Commission took into account in its basic decisions the principle of a system of undistorted competition in order to achieve that compromise. As far as Article 3 is concerned, in the present case the Commission had in any case to take into account, besides paragraphs (d) and (g) cited by the applicants, paragraph (c) (establishment of the lowest possible prices) and paragraph (e) (harmonization of the standard of living and working conditions of workers in each of the industries for which the Community institutions are responsible). The last two aims could perhaps be equally well invoked in justification of the contested decisions.

(d) The alleged breach of the prohibition of discrimination

The applicants' fourth submission — misuse of powers through the alleged breach of the prohibition of discrimination contained in Article 4 (b) — is of course closely related to the submission complaining of a breach of the principle that production quotas must have a neutral effect on competition. The discrimination is alleged to reside in the preference shown to small and medium-sized producers of concrete reinforcing bars to the detriment of integrated undertakings through the application of distinguishing criteria which, in the applicants' view, do not justify such unequal treatment.

The applicants maintain that the Commission assumed without any evidence that all integrated undertakings were in a better market position as regards their other products and were therefore economically and financially stronger. The compulsion to make good losses in one sector with profits from another — which was incorporated in the decisions for that reason — is intrinsically inequitable, according to the applicants. Besides, such a possibility does not exist for undertakings which are making losses on other kinds of steel. Furthermore, in the event of a slump in demand for concrete reinforcing bars, the attainment of the aim of maintaining employment as far as possible laid down in Article 58 (2) is jeopardized just as much in the case of integrated undertakings as it is in the case of single-product undertakings.

Finally, it is argued that amongst the favoured undertakings there are undoubtedly many which were stronger economically or at any rate no weaker than the integrated undertakings.

A further argument advanced by Thyssen AG is that, as far as its production of concrete reinforcing bars is concerned, it must be regarded as a single-product undertaking in the same way as the undertakings to which the Commission gave special treatment. It too has built an electric furnace designed exclusively for the production of concrete reinforcing bars, merchant bars and wire rod. Moreover, according to previous decisions of the Court (in particular the judgment of 7. 7. 1982 in Case 119/81, *Klöckner* v *Commission,* [1982] ECR 2627), departures from the principle of uniform production cuts are permissible only in very exeptional cases on equitable grounds and not simply on the ground of certain differences in production structure or economic situation.

In defence of its contested decisions the Commission has argued that there is no discrimination because the single-product undertakings and the integrated undertakings are not in comparable situations. In its view, the relevant differences in this regard are:

(i) the difference between small and medium-sized undertakings on the one hand and large undertakings on the other;

(ii) the fact that products in Categories IV, V and VI represent more than 90% of the total production of the single-product undertakings and only approximately 20% of the integrated undertakings production; and

(iii) the necessity to avert the imminent danger of ruin facing the single-product undertakings whereas the integrated undertakings were able to make good losses on concrete reinforcing bars with profits from other sectors.

The Commission in fact regarded the last point as decisive in this case.

In answer to the applicant's argument that not all the favoured undertakings were in the same financial difficulties the Commission replied that its investigation of prices and costs revealed that all the undertakings favoured by the decisions at issue were indeed in the same economic situation. However, it must immediately be pointed out that the Commission's answer to the Court's written question asking it to produce the results of its investigation allows only very *general* and moreover fairly vague conclusions to be drawn with regard to the pattern of costs and prices of the various groups of producers of concrete reinforcing bars and with regard to their basic situation. The Commission's answer by no means rules out the possibility that some single-product undertakings might, by buying quotas for example, have managed to remain profitable. The answer contains no evidence whatsoever (for example in the form of the generalized data or even aggregated data on individual undertakings) to suggest that the Commission actually investigated the situation of each individual undertaking.

As far as Thyssen is concerned, the Commission accepts that it uses the same technique for producing concrete reinforcing bars as the single-product undertakings. But it maintains that the structure of the undertaking as a whole enables it to set off losses internally, especially as concrete reinforcing bars account for only 1% of its total production.

Since the Commission itself considers, as its defence shows, that the ability to set off losses internally is the decisive factor in deciding whether or not the different treatment is permissible, I shall give this argument particular consideration.

Support for the view that different treatment is not permitted may be derived above all from the second sentence of paragraph 27 of the Court's judgment in the *Padana* case. That sentence reads as follows: "Once the Commission had decided to establish a general system of quotas it could not distinguish between integrated and non-integrated undertakings if it wished to achieve its objective of reducing production." That judgment had already been delivered by the time Decisions No 533/82 and No 1698/82 were adopted. The reasons adduced for nevertheless treating the two groups of producers of concrete reinforcing bars differently must therefore be subjected to particularly stringent requirements. In this regard it can be noted that according to the preamble to Decision No 533/82 the main reason for the different treatment is the ability or otherwise to set off losses internally. I refer here to the second part of paragraph 3 and the first subparagraph of paragraph 4 of that decision.

However, it is not yet settled that this distinguishing criterion does in fact constitute, in the light of the aims of Article 58, an objective criterion capable of justifying the unequal treatment of the two groups of producers and a departure from the principle laid down in the passage cited from the Court's judgment in *Padana.*

Admittedly, it is very common for undertakings with a diverse production spread to set off losses internally and this possibility is an important commercial reason for diversifying production. In this way a diversified undertaking can reduce the market risks posed by each individual product to the profitability of the undertaking as a whole. However, barring temporary setbacks in parts of the market, a well-managed undertaking will still endeavour to achieve a sufficient margin of profit on each product. Whether the Commission may interfere with such business considerations by actually compelling undertakings with a diversified production programme to set off losses internally depends, in my view, on how the aims of Article 58 are interpreted and on the scheme of the existing quota systems as a whole.

I have already pointed out when considering the principle of neutrality as regards competition that in accordance with those aims interference with the market mechanism and the competitive positions of undertakings in relation to one another must not exceed what is strictly necessary in order to adjust total supply of the various kinds of steel to the severely reduced demand. I have also pointed out how the basic general decisions are consistent with that principle of "proportionality" in various respects. If it were actually found that the very existence of a whole group of producers with relatively low production costs was threatened by radical changes in the market situation, the Commission could rely upon Article 3(c) as a ground for the adoption of exceptional rules and, in the case of a disproportionate threat to employment in a certain region, on Article 3 (e) also. In view of the overriding principle of fairness laid down in Article 58 (2) such considerations might perhaps justify the adoption of preferential rules for the group of producers concerned. However, it would also have to be shown that even after the adjustment to demand had taken place the group of producers concerned would not as a whole obtain a larger share of the then smaller market in concrete reinforcing bars than the other producers.

However, as I explained when discussing the applicants' second submission, there has been no question of such justification in this case. The grounds given are not in fact based on the consequences of the market situation but on the consequences of the quota system and on considerations of fairness, which in the scheme of the basic decisions can justify individual exceptions only. The complaint of discrimination must therefore be considered well founded since none of the objective grounds which might justify the preferential treatment in question, derived from Article 58 of the

Treaty or from the basic decisions, have been pleaded. That also constitutes definitive proof that the principle of neutrality as regards competition has been infringed.

(e) The alleged infringement of essential procedural requirements

In these circumstances it is no longer necessary to examine the applicants' fifth submission, namely that powers were misused through the infringement of essential procedural requirements. The arguments for and against this submission were in any case mainly a repetition of the arguments which have already been considered. I refer in this regard to the Report for the Hearing.

4. The individual decisions addressed to Thyssen AG

The submissions of Thyssen AG are basically that the contested general decisions are unlawful. Under Article 33 of the Treaty this applicant cannot of course directly seek a declaration that the general decisions are void. The question thus arises of the extent to which Thyssen AG, by invoking the unlawfulness of Decisions No 533/82 and No 1698/82, may in fact challenge the quotas allocated to it. As I pointed out in my summary of the relevant texts, those quotas are of course directly based on Decisions No 532/81 and No 1697/82.

In my view, however, the contested individual decisions are in fact also based on Decisions No 533/82 and No 1698/82, at any rate indirectly. Those decisions clearly form a whole with Decisions No 532/82 and No 1697/82. They were enacted on the same dates and in Decisions No 533/82 and No 1698/82 express reference is made to Decisions No 532/82 and 1697/82 for the calculation of the abatement rate for concrete reinforcing bars, which are then reduced by 5 %. At the hearing the Commission even implicitly accepted that the total production restrictions arising from Decisions No 532/82 and No 533/82 and from Decisions No 1697/82 and No 1698/82 had a decisive influence on the terms of all those decisions. The terms of Decisions No 532/82 and No 1697/82, on the basis of which the quotas allocated to Thyssen AG were fixed, are thus in fact based on the terms of Decisions No 533/82 and No 1698/82.

In its judgment of 13 July 1966 in Case 32/65 *(Italy* v *Council and Commission* [1966] ECR 389) the Court held that it is necessary but also sufficient for the regulation whose legality is called in question to be applicable, directly or indirectly, to the issue with which the action is concerned. Since in this case the quotas allocated to Thyssen were partly based, at least indirectly, on Decisions No 533/82 and No 1698/82, it could quite properly plead the illegality of those decisions in the actions brought against the quotas allocated to it. That illegality must then be accepted for the reasons I have already explained.

5. Summary and conclusion

To sum up, then, I am of the opinion that the actions of both applicants must succeed on the grounds of various related submissions put forward by them. Examination of the fourth submission has shown that the breach, complained of in the first submission, of the principle of neutrality as regards competition underlying Article 58 and the quota systems through the fixing of different abatement rates for singleproduct undertakings and for integrated undertakings is not justified on objective grounds derived from the Treaty or from the scheme of the basic decisions. On that ground alone the contested decisions amount to unlawful discrimination and a misuse of the powers conferred by Articles 16 and 18 of Decisions No 1831/81 and No 1696/82. Moreover, examination of the second submission has shown that the powers conferred by Articles 16 and 18 of Decisions No 1831/81 and No 1696/82 were in any case, as is clear from the wording of Decisions No 533/82 and No 1698/82 and the explanations provided at the hearing, clearly used for a purpose other than that for which they were intended and in particular in order to evade the conditions laid down in Article 14 of Decisions No 1831/81 and No 1696/82 for granting exceptions on account of certain inequitable results of the quota systems themselves.

I therefore conclude that:

1. Commission Decisions No 533/82/ECSC and No 1698/82/ECSC must be declared void;

2. The individual decisions of the Commission of 30 March and 20 July 1982 by which Thyssen's reference production and production quotas for the second and third quarters of 1982 were communicated to it must be declared void in so far as they concern the abatement rates for Category V (concrete reinforcing bars);

3. The Commission must be ordered to pay the costs.