In the second place, with regard to the requirement of a restructuring plan, it must be acknowledged that the Commission is quite correct, in view of the seriousness of the crisis in the steel industry and of the measures needed to overcome it, to regulate the process of restructuring by a series of measures of which the quota system forms part. Consequently, it is not arbitrary to require that the capacity reductions conferring the right to the allocation of additional quotas should form a coherent whole and be in conformity with the requirements laid down by the Commission in its decisions concerning aid to the steel industry or with a restructuring plan which was adopted by the undertaking but which is compatible with the general restructuring objectives laid down by the Community institutions.

Finally, there are no grounds for objecting to the inclusion in the system of production quotas of criteria which form part of the system of aid to the steel industry, since the objective of both systems, despite the differences in their legal basis and the criteria for their application, is restructuring. It is therefore neither arbitrary nor discriminatory if factors resulting from the application of one of the systems are used as a point of reference in the other.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 27 June 1985 *

Mr President,
Members of the Court,

1. The effects of the crisis in the steel industry began to be felt in 1973, the year of the first oil price shock, which led to a fall in economic growth and in investment in the automobile and shipbuilding industries and other industries which had previously been responsible for a high level of demand for steel. A further factor in the crisis was the appearance of steel substitutes and an increase in the supply of steel at very low prices from countries which were rich in raw materials and had a cheap labour force.

Accordingly, the steel industry was operating with excess capacity. Prices dropped but production costs increased.

In such circumstances the Community has a duty to take steps to resolve the crisis under the Treaty establishing the European Coal and Steel Community (ECSC), which gives the power of decision in such matters to the Commission acting with the assent of the Council.

All the Member States accepted that the imbalance between supply and demand was of a structural nature and that it was necessary both to reduce production capacity and to modernize and rationalize existing plants. The general purpose of those measures was therefore to effect a restructuring of the European steel industry whilst ensuring a sufficient level of income for steel undertakings.

* Translated from the French.

The policy inaugurated at the end of the 1970s began with the introduction of a system of minimum prices together with indirect action in the form of, *inter alia*, agreements by individual undertakings to limit deliveries and agreements with non-member countries with regard to prices and quantities.

Since 1980 the policy has been based on two schemes:

(a) A scheme to *regulate aid granted by Member States* was introduced in 1980 by Commission Decision No 257/80/ECSC establishing Community rules for specific aids to the steel industry (Official Journal 1980, L 29, p. 5), which was adopted under Article 95 of the ECSC Treaty and is generally known as 'the First Aids Code'. It was replaced by Commission Decision No 2320/81/ECSC (Official Journal 1981, L 228, p. 14), known as 'the Second Aids Code', which is to apply until 31 December 1985. As is stated in by the first recital in the preamble to that decision:

'The essential aim' of those rules 'was to establish a Community aid system under which specific aids could be accorded to the steel industry for certain defined purposes, provided that they promoted restructuring, were restricted in duration and intensity and did not provoke unacceptable distortions of competition'.

Pursuant to the Second Aids Code, the Commission authorized nine Member States, by nine decisions of 29 June 1983 (Official Journal 1983, L 227, p. 1), to grant aid of a fixed amount to undertakings in those countries on the basis of plans notified by the States to the Commission. Those decisions fix both the maximum amount of authorized aid and the minimum reduction in production capacity on which the grant of the aid is conditional. In addition, since the proposals notified by some States were too brief they were required to send to the Commission by 31 January 1984 a list of the plants to be closed in the case of each undertaking in order that the Commission could satisfy itself that the capacity reductions laid down in respect of the plans had been achieved.

In other proceedings before this Court the Federal Republic of Germany, supported by the Wirtschaftsvereinigung Eisen- und Stahlindustrie [German Iron and Steel Association] has brought an action seeking partial annulment of the decisions of 29 June 1983 authorizing the Belgian, French, Italian and British Governments to grant aid to certain steel producers (Case 214/83 *Federal Republic of Germany* v *Commission*). Advocate General VerLoren van Themaat presented to the Court his Opinion in that case on 23 May 1985. Valuable information is given therein on the aid scheme and more generally on the Community's policy with regard to the crisis in the steel industry.

(b) *A system of steel production quotas* for undertakings operating in the steel industry, the application of which has already been the subject of numerous actions before the Court, was established by Commission *Decision No 2794/80/ECSC* of 31 October 1980 (Official Journal 1980, L 291, p. 1). That decision was adopted under Article 58 of the ECSC Treaty as a result of an abrupt fall in demand for steel in the Community during the third quarter of 1980. The Commission ascertained that the utilization rate of the production capacity of Community undertakings had fallen to 58% and therefore considered that the Community faced a 'manifest crisis' within the meaning of Article 58 of the Treaty. It also declared that the indirect courses of

action which it had previously employed had proved insufficent and that it was necessary 'to intervene directly, by means of binding measures relating to production, in order to restore balance between supply and demand' (second and third paragraphs of point 3 in the preamble to Decision No 2794/80).

The quota system was extended by general decisions of the Commission on two occasions, namely by *Decision No 2177/83/ECSC* of 28 July 1983 (Official Journal 1983, L 208, p. 1), which has been amended on three occasions (Decision No 2546/83/ECSC of 7 September 1983, Official Journal 1983, L 250, p. 17; Decision No 2748/83/ECSC of 30 September 1983, Official Journal 1983, L 269, p. 55; and Decision No 3280/83/ECSC of 8 November 1983, Official Journal 1983, L 322, p. 35), and by *Decision No 234/84/ECSC* of 31 January 1984 (Official Journal 1984, L 29, p. 1).

The quotas are established by the application of abatement rates fixed each quarter in respect of the reference production of each undertaking.

In the course of its evolution the quota system has acquired a certain flexibility. It has become possible to exchange or transfer quotas and even reference figures between undertakings (see, in particular, Commission Document COM(83) 236 final, p. 3).

In addition, a system of *'additional' quotas* was established by Article 14 b of Decision No 2177/83 'in order to encourage undertakings to make the closures required rapidly under the restructuring plan approved by the Commission' (point 11 in the preamble). The wording of Article 14 b was amended slightly by Decision No 3280/83. Article 14 B of Decision No 234/84 renewed the system of additional quotas in words which did not alter the essential criteria for its application.

The four joined cases now before the Court concern the criteria for the application of the system of additional quotas. It is therefore necessary to consider certain aspects of that system in detail.

As originally enacted (in Decision No 2177/83) Article 14 b provided as follows:

'(1) The Commission may allocate additional quotas to undertakings where under a restructuring plan approved as suitable for ensuring the undertaking's viability in 1986, they have carried out at least three-quarters of the capacity closures provided for in the undertaking's restructuring plan since 1 January 1980. The undertaking must not have been the subject of penalties, in respect of the price rules, or must have paid fines due.

(2) The firms concerned should submit their applications, accompanied by supporting documents, in the first six weeks of the quarter.

(3) The additional quota shall be calculated as follows:

(a) the Commission shall determine the ratio of the undertaking's total reference production to the reference production of all the undertakings;

(b) it shall also determine the ratio of closures already effected since 1 January 1980 by the undertaking in question to the total closures to be effected by the undertaking in the

context of the restructuring plan referred to in paragraph 1. It shall determine the coefficient resulting from the product of these two ratios;

(c) the additional quota shall not exceed the product of 250 000 tonnes and the coefficient referred to in (b): it will be divided between the different categories of products according to the structure of the production references of the undertaking.'

The second version of that provision (in Decision No 3280/83) amended the first sentence of Article 14 b (1), on account of 'unforeseen difficulties' encountered in the application of the original version, as follows:

'The Commission may allocate additional quotas to undertakings where, under a restructuring plan submitted to the Commission, they have carried out since 1 January 1980 at least three-quarters of the capacity closures provided for in the undertaking's restructuring plan and those demanded, where required, by the Commission in its Decisions of 29 June 1983 concerning aids to the steel industry.'

The remainder of the provision remained unchanged.

In its final version (in Decision No 234/84) Article 14 b became Article 14 B. According to point 7 in the preamble thereto it was adopted 'to reinforce the provisions of this Article in order to give the undertakings greater incentive to restructure rapidly' and required 'additional effort from the undertakings, but for a more substantial gain'; the wording of the provision therefore corresponds largely to the original Article 14 b. The requirement originally laid down that three-quarters of the capacity reduction must have been carried out is extended to '85% of the sum total of the reductions in capacity provided for in its restructuring plan and of any reductions required by the Commission in its decisions concerning aids to the steel industry'.

A second subparagraph, added to Article 14 B (2), provides that as from 1 July 1984 undertakings are to be eligible to benefit under the article only if the Commission has approved their restructuring plan or if the Commission considers it justified in the context of the restructuring plan concerned.

2. The four actions now before the Court were brought by two undertakings operating in the German steel industry: Cases 211/83 and 78/84 were brought by Krupp Stahl AG (which I shall refer to as 'Krupp') and Cases 212/83 and 77/84 were brought by Thyssen Stahl AG (which I shall refer to as 'Thyssen'). The Federal Republic of Germany intervened in support of the applicants.

I should point out that the applicants and the intervener do not dispute the *principle* that additional quotas may be granted as compensation for reductions in production capacity. They object to the *criteria* adopted by the Commission for determining which underertakings may be given those quotas, that is to say primarily the reference date of 1 January 1980 for the assessment of the capacity reductions already carried out, and secondly the reference to a 'restructuring plan' (Article 14 b of Decision No 2177/80, Article 1 of Decision No 3280/83 amending Article 14 b, and Article 14 B of Decision No 234/84).

According to them the effect, if not the aim, of those criteria is to give an advantage to those undertakings which have maintained

their production capacity artificially by means of subsidies to the detriment of those which, voluntarily and without subsidies, reduced their capacity as soon as the crisis in the steel industry became apparent or, at the latest, when the Commission recommended such a course of action in 1977.

The formal claims made in the actions brought in 1983 were amended slightly in the applicants' replies in order to take account of the change in the wording of Article 14 b (Decision No 3280/83) which was adopted while the written procedure was in progress. The actions brought in 1984 arise from the enactment of Decision No 234/84 (Article 14 B). Taken as whole they seek the partial annulment of Article 14 b (14 B) with regard to the reference therein to 1 January 1980 (both applicants) and to a restructuring plan (Krupp).

Krupp claims that the Court should:

(1) 'Declare void Article 14 b of Commission Decision No 2177/83/ECSC ... as amended by Decision No 3280/83/ECSC ... in so far as

(a) it provides that additional quotas are to be allocated only to those undertakings which have carried out since 1 January 1980 three-quarters of the reductions in production capacity laid down in a re-structuring plan, and

(b) the allocation of additional quotas is subject to the further requirement that the undertakings have carried out three-quarters of the reductions in production capacity required by the Commission in its decisions of 29 June 1983 concerning aids to the steel industry ...' (Case 211/83);

(2) Declare void Article 14 B of Decision No 234/84/ECSC on the same grounds, bearing in mind that the proportion of three-quarters was changed to 85% by that provision (Case 78/84).

Thyssen claims that the Court should declare void

(1) Article 14 b of Decision No 2177/83/ECSC, as amended by Commission Decision No 3280/83/ECSC (Case 212/83), and

(2) Article 14 B of Decision No 234/84/ECSC (Case 77/84),

in so far as those provisions provide that 'the allocation of additional quotas is dependent on conditions which exclude reductions in capacity effected before 1 January 1980'.

3. Although the applicants seek the same result their contentions and arguments, which were defined more clearly in the observations of the Government of the Federal Republic of Germany, are not absolutely identical. However, in view of their similarity it is possible to consolidate them without too great a risk of distortion. Both applicants and the intervener based their arguments on the second paragraph of Article 33 of the ECSC Treaty, which enables undertakings to institute proceedings against decisions and recommendations concerning them which are individual in character or against general decisions or recommendations which they consider involve a *misuse of powers* affecting them.

In this case the misuse of powers is composed of the following three factors:

(a) The choice of the *reference date* — 1 January 1980 — is arbitrary and consequently has a *discriminatory effect.*

It is argued that the choice of that date results from the wish to assign greater value,

with regard to the allocation of additional quotas, not to the reductions in capacity effected by German undertakings since 1977 but to those reductions which remained to be carried out on 1 January 1980. There is no objective justification for such a decision when, on the contrary, the choice of a date closer to the time when the restructuring policy was defined by the Commission, for example 1 January 1978, would have been more justified.

The effect of choosing 1 January 1980 as the cut-off date is to exclude those undertakings which endeavoured to manage to act upon the Commission's recommendations from the beginning. The only efforts taken into account are those made after that date by undertakings which were able to defer the measures as a result of State subsidies. In addition it is difficult to see what value additional quotas calculated on that basis have in encouraging the adoption of the necessary measures.

The effect of such discrimination is to distort competition in the steel market since undertakings which have striven from the beginning to re-establish a balance between supply and demand receive no reward whereas subsidized undertakings are allocated additional quotas which they do not merit. The applicants refer in that connection made to the Court's judgments of 3 March 1982 (Case 14/81 *Alpha Steel Limited* v *Commission* [1982] ECR 749) and 28 October 1981 (Joined Cases 275/80 and 24/81 *Krupp Stahl AG* v *Commission* [1981] ECR 2489) in order to emphasize both the importance of the principle of equal treatment in the application of Article 58 and the limits laid down in the Court's judgments with regard to the allocation of additional quotas, which are intended to compensate for the efforts made to restructure without prejudicing undertakings which have acted earlier or more appropriately.

The applicants maintain that it is no answer to say, as the Commission does, that the efforts made by German undertakings to restructure in anticipation of the qualifying date were already taken into account by increasing the reference production figures under Article 4 (4) and (5), of Decision No 2794/80. Those provisions

(a) do not have the same objective as Article 14 (b) (14 B): Article 4 (4) relates to increases in production capacity and Article 4 (5) relates to undertakings which, as a result of modernization, have made a profit on their production; and

(b) are intended not to promote restructuring but to prevent the allocation of additional quotas from prejudicing certain undertakings.

In any case, the benefit of those provisions disappears in time. Finally, since the date chosen for their application was 1 July 1980 and not 1 January 1980 undertakings which were able to carry out restructuring measures in accordance with Article 14 b (14 B) during that interval of six months were recompensed twice.

With regard to the chart submitted by the Commission as evidence that an undertaking which had been restructured before 1980 could benefit from an additional quota more easily than other undertakings which had delayed restructuring, the applicants make the following comments:

Where an undertaking had effected three-quarters of its closures before 1980 *a fortiori* the whole of its restructuring plan did not fall within the provisions of Article 14 b (14 B).

The chart is based, moreover, on the fact that the capacity reductions effected before 1980 have been determined; the

Commission did not rely on that criterion, however, but on the restructuring plans.

The additional quota was calculated according to two methods which are equally discriminatory, that is to say either by reference to the proportion of reductions still to be carried out, which would favour those undertakings which had carried out no restructuring before that date, or by reference to an equal proportion of reduction by allocating the same additional quota regardless of the total restructuring effort which had already been made.

(b) The allocation of additional quotas is dependent upon the existence of a *restructuring plan.* The applicants allege that that requirement is discriminatory.

In the absence of any definition the term 'restructuring plan' must refer to the plan used in the context of the Aids Code.

The effect of the necessary connection which has been established between aid, the restructuring plan and the allocation of additional quotas is that only undertakings which have applied for additional quotas and which satisfy the conditions for the grant of aid under the aids code are eligible for additional quotas. Consequently, undertakings which, like the applicants, have made no such application are excluded from the benefit of those quotas without any objective justification for such a difference in treatment. They even suffer a double detriment in comparison with those undertakings which receive both aid and additional quotas.

Finally, the applicants maintain that if what was meant by 'restructuring plan' was not the same as what was meant by the same term in the aids code it would be so vague that it would lead to another form of discrimination. It would then be for the undertakings themselves to define the scale of the reductions to be effected: in view of the conditions governing the approval by the Commission of the resulting plans the allocation of quotas would depend on the whim of the undertakings.

(c) Finally, the introduction of an express reference to *decisions concerning aid* merely serves to confirm the discrimination which has just been described. This new criterion is, moreover, impracticable.

The Commission's requirements with regard to capacity reductions are general requirements, the division of those reductions between different undertakings being left to the discretion of the Member States. That division of responsibility makes the aforementioned criterion impossible to apply, since undertakings cannot determine directly, on the basis of the Commission's decisions, their own capacity reductions.

In addition, the criterion is inappropriate because the conditions for granting aid and for allocating additional quotas are different: the former are based on regional and social considerations whilst the latter are based on an objective allotment of capacity reductions.

4. The foregoing are the arguments which may be elicited from the four joined cases, bearing in mind that particular emphasis is placed on one or other of them according to the case and the context.

In objecting to the discriminatory effect of the provisions Krupp, in Case 211/83, stresses both the choice of date and the reference to the restructuring plan which is linked to the aid scheme, whilst Thyssen and the German Government, in Case 212/83, lay emphasis primarily on the choice of date.

Cases 77/84 and 78/84, it must be remembered, arise from Decision No 234/84, Article 14 B of which refers to an undertaking's restructuring plan and to any reductions required by the Commission in its decisions concerning aids. Consequently, the emphasis in those cases is primarily on the nature of the relationship between the quota system and the aid scheme.

In addition, Thyssen based its application not only on the second paragraph of Article 33 of the ECSC Treaty but also, in view of the reference contained in that paragraph, to the first paragraph of Article 33. According to Thyssen, Decisions Nos 2177/83, 3280/83 and 234/84, despite their abstract wording, are, as regards Thyssen, *individual* decisions since the introduction of the reference date permits the direct identification of a given number of undertakings, known to the Commission, which would be recipients of additional quotas. Since Articles 14 b and 14 B, by virtue of their choice of date, favour certain undertakings to the detriment of others, one of which is the applicant, they should be regarded as decisions affecting it directly and individually. As such they must fail to satisfy the Court as the Commission has not given any reasons for that choice and has therefore breached an essential procedural requirement.

5. The Commission contends that the date chosen is a general criterion for the application of the provision and that Article 14 b (14 B) does not affect the applicant's legal position either individually or directly.

It claims that the Court should declare Thyssen's application inadmissible in so far as it is based on the first paragraph of Article 33 of the ECSC Treaty.

In the alternative, the Commission maintains that the application is unfounded because each of the undertakings subjected to the quota system should have known that the restructuring measures effected before 1980 had been taken into account and compensated for in the calculation of the reference production figures which therefore permitted higher quotas. It was therefore not necessary to provide particular reasons for the choice of the date.

6. The admissibility of the applications in so far as they are based on the second paragraph of Article 33 of the ECSC Treaty is not disputed by the Commission, which claims, however, that the Court should declare them unfounded.

It states generally that the applications cannot seek merely a partial annulment of the provisions since the removal of certain elements of Article 14 b (14 B), especially the date of 1 January 1980, would deprive the provision of its balance and would have the effect of a total annulment.

The Commission points out that the Court has approved the basic principles of the system established by Decision No 2794/80. That decision has already established a relationship between the system of production quotas and restructuring measures (Article 4 (4)). Since the voluntary efforts of undertakings proved to be insufficient it was necessary to emphasize that relationship in a more formal manner in Decision No 2177/83.

The Commission sets out the aim of its policy since establishing the quota system: faced with excess production it was necessary, in order to adapt the structure of the steel industry, to both modernize and rationalize undertakings so that their productivity and profitability increased and

to close plant which was unprofitable or obsolescent. Despite the considerable initial progress made with regard to modernization the number of closures had to increase appreciably in view of the over-capacity which was found to exist and the objectives which had been laid down. Accordingly, Articles 14 a, 14 b and 15, known as 'the restructuring articles', were inserted into the decisions concerning quotas.

The Second Aids Code makes the allocation of aid dependent on restructuring plans which are intended to render aid unnecessary in time. With regard to quotas Article 14 a, 14 b and 15 are intended to achieve the same objectives as the Aids Code.

The purpose of *Article 14 a* is to permit undertakings whose competitiveness justifies the maintenance of existing plant to increase their production rate by means of an adjustment of their reference production and quantities, on which the calculation of the quotas is based. Without such a corrective mechanism they might be at disadvantage in comparison with those undertakings whose plant had to be closed and which, since their reference production was maintained, witnessed an increase in the production rate of their remaining plant.

Article 14 b meets the need to deal with structural imbalance and encourages undertakings to effect capacity reductions as quickly as possible by allocating additional quotas to the undertakings which have absorbed most of their surpluses.

In turn, *Article 15* is intended to adapt the reference production and quantities to the new plant structure of undertakings which have effected restructuring by means of exchanges of reference production and quantities or by means of transfers within certain groups of categories of products.

7. (a) With regard to *the choice of 1 January 1980* as the relevant date the Commission denies that its intention was to take account, for the purpose of granting increases in quotas, solely of closures effected after that date.

The date is a *stock-taking date* for determining the level of surpluses in the Community on 1 January 1980 and distributing the necessary reductions amongst the Member States. It was the most appropriate date because it was the date on which both the aids code and the quota system were established. Furthermore, it was on the basis of the surplus capacity registered in the Community on 1 January 1980 that the capacity reductions were distributed amongst the Member States. The surplus was put at 48 million tonnes and the capacity reduction was fixed at 27 million tonnes which was the maximum which the European steel industry was able to sustain given the political and social consequences thereof in certain areas. Accordingly, on the basis of the situation on 1 January 1980 the most subsidized undertakings in the Community, representing a total production capacity of 77 million tonnes, were obliged to reduce that capacity by 19,8 million tonnes.

The applicants, who until 1980 belonged to those undertakings which were not in receipt of subsidies, benefited, like the other undertakings, from the crisis measures adopted by the Community.

In view of the efforts made before 1980 the extent of the restructuring measures they had to carry out was far less than it would otherwise have been.

Finally, the applicants benefited, by virtue of restructuring effected before 1980, from the provisions of Article 4 (4) and (5) of Decision No 2794/80 which enable the reference production figures to be adjusted and increased. Those figures were, moreover, taken into account in the subsequent general decisions so that the effect of the advantage thereby granted was extended.

The Commission maintains that for that reason it was not possible to take account for a second time of the reductions effected before 1980. Those reductions had already been compensated for and the effect of reintroducing them into the calculation of the additional quotas would have been to recompense the same effort twice. Conversely, a later date would have penalized certain undertakings which had embarked on restructuring measures in 1980. Therefore, in the Commission's opinion, the choice of 1 January 1980 as the relevant date was objectively justified.

(b) With regard to the requirement of a '*restructuring plan*', which is linked to an application for aid, the Commission maintains that it is a *technical term* covering not only plans submitted to it by undertakings seeking the grant of aid but also those drawn up exclusively for the purpose of the allocation of additional quotas.

Krupp submitted its restructuring plan for the purpose of the allocation of additional quotas in November 1983. That plan, which was initially rejected by the Commission as being insufficient, was finally accepted on the basis of an additional reduction in production of 300 000 tonnes and was subsequently included in the communication drawn up by the German Government in connection with the aid system. It was therefore possible to grant quotas to Krupp.

(c) With regard to *the reference to the decisions concerning aid*, especially in Article 14 b, as amended, the Commission emphasizes that the conditions for the allocation of an additional quota were not made stricter than they had been in Decision No 2177/83 and contends that the fact that the two systems, the quota system and the aid scheme, are not of the same nature does not prevent their being linked, and the existence of such a link cannot render the provision in question null and void.

Decision No 3280/83 could not impose on German undertakings an immediate obligation to reduce capacity in connection with the aid received. The Federal Republic of Germany had until 31 January 1984 to notify the Commission of the distribution amongst undertakings of the closures envisaged. Consequently, and until that date, Decision No 3280/83 could not adversely affect the applicants.

Subsequently, German undertakings could benefit from additional quotas allocated either according to the procedures for implementing the Aids Code or, in the absence of such subsidies, on the basis that their own restructuring plan had been approved by the Commission.

8. It is necessary to make certain preliminary points before I examine the arguments described above.

Although the Community objective — reduction of the production capacity of steel undertakings in order to redress the

structural imbalance in the steel industry — was referred to by the Commission from the beginning, an explanation of the working of the provisions adopted to achieve that objective only came to light in the course of the proceedings.

The Court has held that as regards measures which amount to regulations, as here,

'... 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' (judgment of 11 May 1983 in Case 244/81 *Klöckner-Werke* v *Commission* [1983] ECR 1451, paragraph 33).

In addition, the reasoning must be discernible and emerge 'clearly and unequivocally' (*idem*).

Consequently, it is to be regretted that the Commission's reasoning was not explained more explicitly in the series of contested decisions concerning the allocation of additional quotas. A reading of the different statements submitted by the Commission leads to the conclusion that a theory was formulated in the course of the proceedings which would have benefited from being more clearly discernible at the time the decisions were adopted. Thus, whilst certain factors should have been known to those operating in the steel industry, the impression is sometimes given that the balance of the system and the relationship between certain provisions such as those of Article 14 b of Decision No 2177/83 and Article 4 (4) and (5) of Decision No 2794/80 were discovered *en passant*.

Finally, it must be noted that there is no definition of the term 'restructuring plan' used in the said Article 14 b, in Decision No 3280/83, which amended Article 14 b, and in Article 14 B of Decision No 234/84.

Those points, which explain the context of the dispute, may have legal consequences, if, as is alleged by Thyssen, the contested measures are to be regarded as individual decisions and in so far as the statement of reasons is to be taken as decisive.

However, I will examine first the arguments, the admissibility of which is not disputed, based upon the concept of misuse of powers under the second paragraph of Article 33 of the ECSC Treaty.

9. *The choice of 1 January 1980 as the reference date*

In its judgment of 15 January 1985 in Case 250/83 (*Finsider* v *Commission* [1985] ECR 142) the Court re-stated the principle that:

'For the Commission to be accused of discrimination, it must be shown to have treated like cases differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences' (paragraph 8).

The Court stated that in order to determine whether the different treatment of which the Commission is accused by the applicant constitutes a misuse of powers:

'It is . . . necessary in the first place to consider whether the treatment is based on the existence of objective and substantial differences having regard to the aims which the Commission may lawfully pursue as part of its industrial policy in the European steel industry' (same paragraph).

On the basis of those statements it is therefore necessary to determine whether the date chosen by the Commission for the application of Article 14 b (14 B) is likely to subject some European steel undertakings to disadvantages as opposed to others.

It cannot be disputed that, *whatever the undertaking*, the date criterion excludes consideration of restructuring measures effected before 1980 in the calculation of additional quotas. The system established by Article 14 b (14 B) reflects the Commission's desire to meet the need for 'encouraging rapid restructuring' by steel undertakings, as is emphasized by the heading to paragraph 11 of the preamble to Decision No 2177/83. That objective is defined as follows:

'In order to encourage undertakings to make the closures required rapidly under the restructuring plan approved by the Commission, additional quotas should be allocated to undertakings when they have carried out most of these closures.'

In order to properly understand the scope of that provision it is necessary to recall the context in which it is placed.

That provision, which was adopted under Article 58 of the ECSC Treaty, forms part of the *policy of intervention* embarked upon by the Commission because of the insufficiency of indirect courses of action (see the second and third paragraphs of point 3 of the preamble to Decision No 2794/80). As the Court itself has stated, the system of production quotas appeared to be the proper response to:

'. . . a very serious crisis, due to the sudden slump in demand and the collapse of prices, [which] affected all steel undertakings in the Community' (judgment of 14 December 1983 in Case 263/82 *Klöckner-Werke* v *Commission* [1983] ECR 4143, paragraph 18).

In order to meet the crisis, the quota system seeks to achieve:

'a general reduction in supply which is intended to bring supply and demand back into balance and to check the fall in prices' (*idem*, paragraph 19).

That principal aim of the policy is therefore to *reduce production* by means, in particular, of restructuring measures. The efforts which had already been made to that end by certain steel undertakings were duly taken into account. That is precisely what is stated in point 4 of the preamble to Decision No 2794/80, according to which:

'to ensure that the system of production quotas does not compromise the restructuring successfully carried out by certain undertakings since the beginning of the crisis, the reference production levels should be adjusted in the light of the actual market situation of these undertakings' (fifth paragraph).

Nevertheless, as was emphasized by the Commission in its defence in Case 211/83, the efforts made by certain undertakings in connection with restructuring proved to be manifestly insufficient. Their conduct did not live up to the Commission's expectations and did not contribute satisfactorily to the need to 'strive together in a display of Community solidarity so as to enable the

industry as a whole to overcome the crisis and to survive' (in Case 263/82, cited above, paragraph 19).

Accordingly, with regard to the common obligations of solidarity, there appear to be two types of undertaking:

those which are competitive on the market and which, without requesting State aid, took the initiative in voluntarily adapting to the requirements flowing from the crisis; and

others which obtained subsidies in circumstances which were sometimes questionable and which were therefore able to defer such adaptation and thereby distorted competition and prolonged some of the causes of the crisis.

The legal measures successively adopted by the Commission are intended to deal with that situation. What substantive provisions apply to undertakings falling within the second category, that is to say those which may be described as 'subsidized'?

(a) It was decided by the general decisions establishing the *Aids Code*:

to subject State aid to rules laid down at a Community level in order to take account of certain social and economic needs which were emphasized by Advocate General VerLoren van Themaat in the Opinion he delivered in Case 214/83; and

to link such aid to the carrying out of restructuring measures in order to re-establish as quickly as possible the balance between supply and demand and normal competitive conditions between undertakings which have been modernized and are once more competitive, such measures being determined globally by the Commission and apportioned between the different undertakings.

The Community framework for aid linked to restructuring has the effect of compensating for its negative effects. That was stated in the Court's judgment in *Finsider* (Case 250/83, cited above) where the Court emphasized that aid intended to encourage restructuring and the improvement of competitivity and granted under the aids code and the quota system must be approved if it furthers the aims of the Commission's industrial policy (paragraph 10).

The Court also recognized in that judgment that the Commission had the power to exclude from the benefit of additional quotas:

'undertakings which have received a form of aid likely to delay the desired restructuring, namely aid intended to cover operating losses' (paragraph 9).

The distinction between undertakings which have been subsidized improperly and competitive undertakings constitutes the background to the provisions of the general decisions at issue in this case.

(b) It must be remembered that in 1980 the *quota system* in a manner of speaking 'froze' the situation - to use the expression employed by Advocate General VerLoren van Themaat — and that the position of undertakings operating in the Community market was definitively fixed at that moment. In the Commission's view Decision

No 2177/83 established 'a formal link between the quota system and restructuring for the first time'. The Commission therefore intended to examine the operation of the system at the end of three years and, in particular, to take account of cases where undertakings, far from responding to the encouragement to restructure, continued to defer action.

Thus, as the Court stated in *Finsider*, cited above, the rules concerning aid and quotas:

'pursue a common aim, namely to promote the restructuring needed to adapt production and capacity to foreseeable demand and to re-establish the competitivity of the European steel industry' (paragraph 9).

The cohesion of the system depends in good measure on its being of limited duration.

Strictly speaking, the Commission's aim is to abolish aid and quotas in the shortest possible time by means of the intervention measures laid down by it: the target date is 31 December 1985. The choice of that date clarifies the scope of Article 14 b (14 B).

What in fact is the fate reserved for subsidized undertakings?

In general the transfer of aid to a Community framework has cut off the artificial survival system for steel producers and has forced the undertakings concerned to carry out rigorous redevelopment.

More specifically, Article 14 b (14 B), by imposing high thresholds (75%, and then 85%, of the restructuring plan must have been carried out), enabled undertakings which had already carried out a large degree of restructuring to benefit from additional quotas, which represent an economic advantage, whereas those undertakings which had still to carry out significant restructuring were obliged to make a much greater effort in order to achieve a comparable position.

It can hardly be disputed that an undertaking which has already recovered a large measure of competitiveness, and which has only 10 000 tonnes of production capacity remaining to be eliminated, should have to carry out far less restructuring than one whose competitiveness has still to be re-established because it has survived until now only by means of subsidies and must reduce its production capacity by 100 000 tonnes in order to be allocated an additional quota.

It is therefore possible to take the view that undertakings which have deferred their restructuring by means of subsidies are penalized by the rules relating to aid and quotas laid down in 1980 since, unlike competitive undertakings, they must contribute more than three times the effort required of non-subsidized undertakings to the global capacity reductions required by the Commission. In addition, they are forced, in order to obtain aid or additional quotas before 1986, to make a major effort to effect the required restructuring.

Such considerations lead me to conclude that the additional quotas provided for by Article 14 b (14 B) do not represent so much a recompense for restructuring as a sanction applied to undertakings which have

not responded in time to the demands of the Community steel policy.

That question must be answered in the negative.

Conversely, what is the position of undertakings whose restructuring efforts began well before 1980?

It must be remembered that whatever capacity reductions were able to be effected by those undertakings a surplus still existed in 1980. As has already been stated, that surplus, estimated at 48 million tonnes, resulted in a requirement that capacity be reduced by 27 million tonnes, of which 7 million was allocated to undertakings benefiting from little or no subsidization. As the Court has stated, that reduction in supply:

Such restructuring, carried out voluntarily, was incorporated in the distribution of production quotas amongst all undertakings, as is clear from the fifth paragraph of point 4 of the preamble to Decision No 2794/80.

'involves heavy sacrifices which must be distributed equitably between all steel undertakings; those undertakings must *strive together in a display of Community solidarity* so as to enable the industry *as a whole* to overcome the crisis and to *survive*' (Case 263/82, cited above, paragraph 19) (emphasis added).

Article 4 (4) and (5) of that decision gave substantive form to that intention. The Court's judgments of 28 October 1981 (Joined Cases 275/80 and 24/81, *Krupp Stahl* v *Commission* [1981] ECR 2489) and of 16 February 1982 (Joined Cases 39, 43, 85 and 88/81 *Halyvourgiki Inc. and Helleniki Halyvourgia SA* v *Commission* [1982] ECR 593, especially paragraph 28 at p. 617) make it clear that Article 4 (4) and (5) of Decision No 2794/80 constitute, by way of derogation from the system of reference production, a corrective mechanism intended to take account, in the case of certain undertakings, of restructuring effected prior to 1979.

In that context it is difficult to compare the obligations which must still be borne by undertakings which have been granted aid and those borne by undertakings which, because they are profitable or almost stabilized, have been able to do without aid: the effort required of the former is in proportion to the accumulated delay, even though the 'reward', that is to say the additional quota, is of the same nature as that allocated to the latter once the conditions laid down by Article 14 b (14 B) are satisfied.

In that manner account was taken of the efforts made on their own initiative of certain undertakings which benefit from little or no subsidization. It may certainly be objected that that spontaneous contribution in anticipation of the requirements subsequently imposed by the Commission, even if it was taken into account, did not exempt those undertakings from any new restructuring obligations. Accordingly, it may be asked whether that amounts to a breach of the principle laid down in Article 58 of the ECSC Treaty that the quotas must be determined 'on an equitable basis'.

The general context in which all the legislation governing the steel market since 1980 was adopted reveals how the effects of the requirement of solidarity must vary according to how much excess capactiy is to be eliminated by each undertaking. Finally,

it must be stated that for a period of six years from 1980, at the end of which the steel industry should be stabilized if the objectives laid down have been achieved, no measure relating to the achievement of the objective of restructuring, and subjecting steel undertakings operating on the Community market to identical conditions, may be regarded as discriminatory. The applicants may obtain additional quotas, which they have, moreover — as has been discovered in the course of the proceedings — already obtained, or which they may obtain, at a lower economic and social cost.

It follows that the choice of 1 January 1980 is based on an objective criterion consistent with the aims which may lawfully be pursued by the Commission within the framework of its steel policy.

At the risk of repeating myself, it is to be regretted that, in view of the reservations already expressed by the German Government in 1982 with regard to the choice of that date as the reference date (see the German Government's letter of 7 July 1982 and the Commission's reply of 22 July 1982, included in the annexes produced by the intervener), the Commission did not consider it appropriate to explain its decision at that time.

10. *The reference to a restructuring plan*

The applicants' argument that there is a compulsory link between the concept of a restructuring plan and the aid scheme does not appear to be well founded. As has been said, the objective of the quota system, as is that of the aid scheme, is restructuring. When the Commission is considering a request for the allocation of additional quotas there is nothing to prevent it, in accordance with the discretion conferred on it by the Treaty, from deciding such a request on the basis of a restructuring plan. The contention that such a criterion excludes from the benefit of additional quotas undertakings which do not wish to have recourse to aid is based on an erroneous assimilation of the concept of a restructuring plan to that employed in the Second Aids Code. Although the terminology used may lead to confusion such an approach is not supported by the facts and the applicants do not adduce any evidence that an additional quota has been refused to an undertaking for the sole reason that it had not applied for aid.

I should add that it is not possible to accept the applicants' view that the drawing up of such a plan, which the undertakings are left to determine freely, deprives Article 14 b (14 B) of its effect of encouraging restructuring. Such a view makes light of the requirement of proper management imposed on every undertaking which takes account of the Commission's 'steel plan'. It also ignores the fact that the Commission checks the soundness of the restructuring plan before it grants aid. The 'restructuring plan' criterion should be given a wide meaning. It certainly covers the plan referred to by the Aids Code in respect of undertakings applying for aid, but it does not exclude the plan which undertakings which do not seek aid draw up for themselves.

Since the files on the cases contain no indication that the criterion was applied in the narrow manner referred to by the applicants it is not possible to find that there has been discrimination amounting to a misuse of powers by the Commission in that connection.

11. *The reference to the decisions concerning aids to the steel industry*

Decision No 3280/83 inserted into Article 14 b a further condition for the allocation of additional quotas, namely the carrying out of three-quarters of the total capacity reductions 'demanded, *where required*, by the Commission in its decisions of 29 June 1983 concerning aids to the steel industry'. Article 14 B of Decision No 234/84 refers to '*any* reductions required by the Commission in its decisions concerning aids to the steel industry' (emphasis added).

The applicants' argument concerning the introduction of criteria which are part of a different system, namely the aid scheme, fails on the simple point that since the two systems, in which the criteria are certainly different, are both intended to serve the aim of restructuring, there is nothing to prevent the facts resulting from the application of one of those systems from being adopted as a point of reference in the other.

That is a natural consequence of the discretion conferred on the Commission. To consider, as do the applicants, that the reference to the decisions concerning aid constitutes discrimination amounts in fact, in the absence of any further explanation, to an objection to the Aids Code itself. In fact the code as such is not challenged in this case.

Accordingly, there does not appear to be any reason why a reference to the aid scheme should not be made for the purpose of allocating additional quotas.

I turn now to the allegation made by Krupp that no reference should have been made to the Commission's decision of 29 June 1983 concerning the Federal Republic of Germany since that decision was too imprecise in view of the fact that the power to determine for each undertaking the capacity reductions required by the Commission was delegated to the Member States.

That complaint does not bear close scrutiny. It is clear from the proceedings and from the explanations given to the Court in the course of the hearing that the Commission has not delegated such powers to the Member States.

With regard to the Federal Republic of Germany, Decision No 83/392/ECSC of 29 June 1983 was formulated on the basis of information given to the Commission by the Federal Republic of Germany, which acted in close consultation with the steel undertakings concerned and after discussions with the Commission.

The decision laying down global requirements was subsequently given detail on the basis of a table drawn up by the Government of the Federal Republic of Germany which stated how the capacity reductions to be effected by German undertakings were to be distributed. The procedure thus adopted by the Commission for reaching its decision is a coherent one, and it cannot be alleged to be too uncertain.

Between 29 June 1983 and 31 January 1984 Krupp, as I said, applied for an additional quota, which after an initial refusal was granted when it agreed to make an additional reduction in the capacity which was allocated to it by the Federal Republic of Germany in the table notified to the Commission. After having satisfied that condition Krupp was able to obtain an additional quota *and* aid. That shows that the rules operated entirely as they should for the benefit of the undertaking.

12. *Admissibility of the action brought by Thyssen under the first paragraph of Article 33 of the ECSC Treaty (failure to provide a sufficient statement of reasons)*

Where an action is brought to have a general decision declared void, the action is only admissible if the contested provisions:

'are likely to affect directly and individually the situation of the persons to whom they apply' (Joined Cases 55 to 59/63 and 61 to 63/63 *Acciaierie Fonderie Ferriere di Modena and Others* v *High Authority* [1964] ECR 211, p. 228).

In that connection the fact that it is possible to determine in advance the undertakings affected is not sufficient to cast doubt on the general nature of a decision (judgment of 30 September 1982 in Case 242/81 *SA Roquette Frères* v *Commission* [1982] ECR 3213, paragraph 7 at p. 3230).

The Court has held that it is also necessary for the contested measure to be of concern to the applicant:

'by reason of certain attributes which are peculiar to [it] or by reason of circumstances in which [it is] differentiated from all other persons and by virtue of these factors distinguishes [it] individually just as in the case of the person addressed' (judgment of 15 July 1963 in Case 25/62 *Plaumann and Co.* v *Commission* [1963] ECR 95).

In this case it must therefore be decided whether Thyssen is differentiated from other undertakings by virtue of the date chosen for the application of Article 14 b (14 B).

It has been seen that the date of 1 January 1980 applies both to steel undertakings which are in receipt of subsidies and to those which are not. Thyssen's argument is based on the idea that the reference date was introduced with the intention of favouring particular undertakings. In the absence of any proof in support of that contention it must be concluded, as I have already indicated, that all undertakings are eligible for additional quotas under Article 14 b (14 B). That provision is part of a set of general rules and is not, in my opinion, of an individual nature.

I therefore conclude that the argument is inadmissible.

13. In view of all the foregoing observations I propose that the Court should:

Declare inadmissible the action brought by Thyssen on the basis of the first paragraph of Article 33 of the ECSC Treaty;

Reject as unfounded the actions brought by Krupp and Thyssen on the basis of the second paragraph of Article 33 of the ECSC Treaty; and

Order the applicants to pay the costs.