OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 27 June 1989 *

Mr President,
Members of the Court,

1. The present reference for a preliminary ruling concerns the interpretation of a number of aspects of the trade arrangements for restricting Community exports of steel tubes to the United States of America. The arrangements in question are found in a combination of international and Community sources; moreover, it should be pointed out that the replies to be given to the national court require an analysis of a number of documents and circumstances. I therefore consider it necessary, even at the risk of overburdening my Opinion, first of all to give a brief summary of the facts and, in particular, to outline the relevant legislation.

2. On 7 January 1985 the EEC and the United States concluded an arrangement, in the form of an exchange of letters, which restricted, on certain conditions, Community exports of steel tubes. That arrangement, which substantially replaced the previous arrangement of 1982, brought to an end, at least temporarily, a bitter and prolonged 'quarrel', which came to a head in November 1984 when the American Government imposed a total ban on imports of steel pipes and tubes produced in the Community. [1]

The compromise reached with the arrangement of 7 January 1985 (originally in force until 31 December 1986 but subsequently extended until September 1989) is based on a quota for Community exports of pipes and tubes of 7.6% of US apparent consumption. That percentage represents an increase in relation to the ceiling of 5.9% which was previously in force. Within the quota of 7.6%, provision was made for a subquota of 10% (of US apparent consumption) in respect of a particular type of tubes used for oil exploration (oil country tubular goods, 'OCTG').

The exchange of letters (approved by Council Regulation No 59/85 of 9 January 1985 [2]) also provides, in point 7, that exports are to be subject to a licensing system pursuant to Community rules to be adopted at a later date.

In implementation of that provision, the Council adopted Regulation No 60/85, [3] likewise on 9 January 1985. It should be recalled that the third recital in the preamble to that regulation states:

'Whereas, for practical and management reasons, the quantitative export limits agreed by the Community must be allocated among the Member States; whereas, in

* Original language: Italian.

1 — For an analysis of the 1982 Arrangement and its consequences, see in particular: (1) I. Pogany: '"Steel Wars" v "Star Wars": the impact of voluntary export restraints on the GATT', in *Current issues in international business law*, 1988; (2) M. K. Levine: *Inside international trade policy formulation, a history of the 1982 US-EC steel arrangements*, 1985; (3) F. Benyon and J. Bourgeois: 'The European Community-United States steel arrangement', *Common Market Law Review*, 1984.

2 — OJ 1985, L 9, p. 1.

3 — OJ 1985, L 9, p. 13.

order to do so, an allocation method must be established; whereas thereafter the Member States must share out the amounts allocated to them among undertakings in accordance with objective criteria'.

The fourth and fifth recitals state:

'Whereas utilization of the Community limits, based on allocations among Member States made in this way, would seem to be in keeping with the Community nature of these limits;

Whereas the allocation among the Member States of the total export possibilities which the arrangement affords should take account of traditional trade patterns'.

Article 2 of Regulation No 60/85 confirms the export limits for steel pipes and tubes in general and for OCTG tubes (7.6 and 10% respectively, as indicated above).

Article 3 then provides that 'the Community quantitative export limits . . . shall be allocated . . . by the Commission in accordance with Annex III'. Annex III lays down, for steel pipes and tubes, a quota for Germany of 2.82% (of US consumption). Italy is allocated a quota of 2% and smaller quotas are allocated to the other Member States (France, 0.93%; Greece, 0.52%; Belgium, 0.48%; United Kingdom, 0.4%; Netherlands, 0.28%; Luxembourg, 0.17%; Denmark and Ireland, 0%). With regard to OCTG tubes, Annex III states that 'the allocation among the Member States will be decided on by the Council . . . before 31 January 1985'. However, it was not until 6 August 1985, as the result of a series of new disputes with the United States, that the Council decided on the allocation of the quotas for OCTG tubes, by means of Regulation No 2355/85.[4]

Article 5 of Regulation No 60/85 lays down the arrangements for the export licence scheme whose adoption, as we have seen, had already been provided for in the prior exchange of letters. In particular, Article 5(2) provides that:

'Licences shall be issued according to the following criteria:

(i) compliance with the rules prescribed by this regulation, in particular those concerning the quota allocated by the Commission pursuant to Article 3,

(ii) compliance with the traditional export patterns of undertakings taking account of the reduction principles established by this regulation and possibly the situation of new producers of pipes and tubes,

(iii) compliance with the rates of exports to the United States as traditionally spread out over the year,

4 — OJ 1985, L 222, p. 1.

(iv) optimum use and administration of the export possibilities afforded by this regulation,

(v) best use being made of any new possibilities provided for, where appropriate, by this regulation.

. . . '

It is important to point out that Article 5(2) was subsequently amended by Council Regulation No 3686/87 of 8 December 1987.[5] The second and third recitals in the preamble to that regulation state:

'whereas economic links have been established between Community undertakings and their subsidiaries in the United States, the latter being supplied by Community undertakings with semi-finished tubes for tube production; whereas the allocation of the Community quota among Member States, as set out in Annex III to the aforementioned regulation, takes account of the special situation of these undertakings with a subsidiary in the United States;

whereas the criteria for the allocation of licences should take account of this special situation; whereas it is therefore necessary to add to the list of criteria laid down for the issue of licences by the Member States the case of Community undertakings which have a subsidiary in the United States and which supply that subsidiary with semi-finished tubes for the production of finished tubes'.

5 — OJ 1987, L 346, p. 26.

For those reasons, the second indent of Article 5(2) of Regulation No 60/85 was replaced by the following:

'compliance with the traditional export patterns of undertakings taking account of the reduction principles established by this regulation and possibly the situation of new producers of pipes and tubes and of undertakings having a subsidiary in the United States which they supply with semi-finished tubes for tube production'.

3. In application of Regulation No 60/85, the Federal Republic of Germany issued export licences essentially on the basis of the criterion of 'traditional export patterns' laid down in the second indent of Article 5(2). The years 1979 to 1984 were used as the reference period. Before issuing the licences, however, the German authorities deducted a quota of 20 000 tonnes from the total national quota (2.82% of US consumption) and allocated it to Hoesch for supplies of OCTG tubes to a subsidiary in Texas.

On 13 May 1985, Bergrohr asked the German authorities to issue it with export licences for a total of 35 378 tonnes of pipes and tubes so that it could fulfil a contract it had entered into with an American company. On the basis of its previous exports, according to the calculations of the German authorities, Bergrohr was entitled to licences for only 3 308 tonnes for 1985/86. Since that amount had already been used to clear the backlog which had

been created by the total ban on imports imposed by the American Government on 30 November 1984, Bergrohr's request was refused.

However, Bergrohr brought an action challenging that decision, claiming that, following fundamental changes in its management and its business activities, it ought to be regarded as a 'new producer' within the meaning of the second indent of Article 5(2) of Regulation No 60/85. It claimed that its status as a new producer ought to be recognized on account, in particular, of the following facts:

(a) It had built, jointly with Dillinger Hüttenwerke, a new works at Dillingen (started in 1981 and completed in 1983).

(b) Its company capital had been increased from DM 7.5 million to DM 30 million, of which Dillinger had a 50% share.

(c) A supervisory board (Aufsichtsrat) had been appointed for the first time, with a representative of Dillinger as chairman.

(d) Its production capacity had been increased considerably (from 250 000 tonnes for the existing works to between 650 000 and 850 000 tonnes, depending on the rate of utilization).

(e) The Dillingen works specialized in manufacturing a new product, namely large-diameter tubes with a wall thickness of more than 25 mm, using new technology.

According to Bergrohr, recognition of its status as a 'new producer' would have allowed it to obtain export licences for larger quantities than it was entitled to if the only criterion applied was 'traditional export patterns'.

4. In addition to the recognition of Bergrohr's status as a 'new producer', the courts also considered a further question: the lawfulness of the special quantity of 20 000 tonnes set aside for Hoesch alone. Bergrohr claimed that Hoesch was not entitled to that special quota because, in its view, the 20 000 tonnes in question should also have been shared among the applicant companies in accordance with the common criteria for issuing licences laid down in Regulation No 60/85.

The courts of first and second instance gave different replies to those two questions. The matter was then brought before the Bundesverwaltungsgericht (Federal Administrative Court) which, since it considered that an interpretation of the provisions in question was necessary in order to settle the dispute, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Can the expression "new producers of pipes and tubes" in Article 5(2) of Council Regulation (EEC) No 60/85 of 9 January 1985 (Official Journal, L 9, p. 13) also include undertakings which have previously produced pipes and tubes but

which, while maintaining their legal form and name, undergo a significant change in economic and legal terms, *inter alia* by admitting a new shareholder, significantly increasing their capital and building a new works with high additional production capacity?

(b) If the answer to part (a) is in the affirmative: may recognition of such an undertaking as a new producer of pipes and tubes be refused on the ground that the circumstances justifying it were in existence long before export restrictions came into effect but were not used at that time for exports to the United States of America?

(c) If the answer to part (b) is in the negative: in what respects must account be taken of the "situation" of such new producers of pipes and tubes in the context of the discretion granted to the national authorities by Article 5(2) of Regulation (EEC) No 60/85?

(2) Can section II of the decision of the Council adopted by the written procedure on 29 December 1984 authorizing negotiations for an arrangement with the United States concerning the export of steel pipes and tubes on the basis of the instructions given in section I and the division of the overall quota of 7.6% of the American market in accordance with section II (point 17 of the Council's monthly list of acts adopted by the written procedure, December 1984), alone or together with Article 5(2) of Regulation (EEC) No 60/85, be interpreted as meaning that the Federal Republic of Germany was required or authorized to make a special allocation of 20 000 tonnes for 1985 and 1986 to a particular producer from its national export quota of 2.82%?'

5. In the first part of the first question, the national court asks the Court of Justice to interpret the term 'new producer'.

In that regard, with reference to the fuller account of the facts and observations contained in the Report for the Hearing, I would point out that Hoesch, the German Government and the Italian Government consider that the status of 'new producer' can be recognized in only two cases: when tube producers are set up from scratch and when undertakings which already exist, but which operate in other sectors, start producing tubes for the first time.

That follows, in their view, from the wording of the relevant provision: a 'new producer' could not be anything other than someone who has not produced tubes previously. They consider that that interpretation is necessary, in particular, in the light of the rationale of the provision. The system of allocating licences within each Member State tends to maintain the existing situation

with regard to competition precisely because it serves to 'freeze' the composition of exports of pipes and tubes to the United States; accordingly, the criterion of compliance with the 'traditional export patterns' constitutes a rule, the only exception to which — that of the 'new producer' — is to be interpreted restrictively. Moreover, the criterion of 'traditional export patterns' is also justified from the point of view of fairness in so far as it shares out equally the onus of the restrictions, and from an economic point of view in so far as it allocates higher quotas to those who have achieved better results in the American market in previous years.

They claim that a 'new producer' is thus simply an undertaking which falls into one of the two categories referred to above and was therefore unable to constitute *any* reference quantity for the past. On the other hand, it would conflict with the exceptional nature of the provision, and more generally with the objective of not changing the position of undertakings which are already operating, if producers which were already in existence were to be recognized as new producers when they changed — even fundamentally — their economic and legal structure. Moreover, in practice an analysis of whether or not the changes implemented were sufficient to justify the conclusion that there was a 'new producer' would require an investigation whose results would be inconclusive and which would be so complex that it would be incompatible with the rapidity and simplicity required of the procedure for issuing licences in question.

6. In my view, that argument cannot be upheld.

In the first place, it is based on the premise that the objective of the system for allocating licences laid down in Article 5 of the regulation is, in general, and save for a few entirely exceptional cases, to maintain the respective positions of the undertakings concerned with regard to sales of pipes and tubes to the United States. In my opinion, that premise is false.

In so far as it constitutes an obstacle to free trade and free competition, a scheme for restricting international trade cannot, in principle, impose restrictions on the operating freedom of undertakings which go beyond what is strictly necessary for the implementation of the system.

The arrangement with the United States, inasmuch as it introduces a limit for Community exports which is, in turn, subdivided into national limits, already involves an evident and perceptible restriction on the actions of the economic operators concerned. Thus, by its very nature, the scheme has a negative effect on the overall development of the sector. Nevertheless, it is justified on account of the prolonged disputes which have characterized trade relations between the EEC and the United States in the steel sector. Consequently, it can be argued that if the agreement on restrictions had not been concluded and the difficulties of American producers had persisted, transatlantic trade relations, at least in the sector in question, would have become even less favourable for the interests of European undertakings.

In other words, the quantitative restrictions which the Community accepted constitute the 'price' which must be paid to ensure

continued market access — albeit at a much lower level — for the European steel industry. However, as stated above, *that does not mean that in addition to the abovementioned quantitative restrictions, the market must be made even more rigid by the adoption of measures which are not laid down in the arrangement and, in particular, are not necessary for its implementation.*

7. In particular, it is obvious that the implementation of the arrangement does not require the export patterns to the United States of *each* of the Community steel undertakings to be substantially 'frozen'.

In fact, the limit imposed by the arrangement is *macro-economic* and not *micro-economic.* It establishes limits and provides for a licensing mechanism to be set up in order to ensure that those limits are complied with. The allocation of the limits among the Member States, and subsequently among undertakings, is a purely internal problem and has no bearing at all on the interests of the American side.

On the other hand, 'freezing' the positions of the European undertakings would, on a micro-economic level, amount to providing a guaranteed income and would act as a disincentive to enterprise and initiative.

Finally, the argument which I now refute would involve limits on private enterprise and competition which are not expressly provided for in any of the relevant measures and which, in any event, are not conducive to the proper administration of the arrangement.

Moreover, it would involve adverse economic repercussions which would be, in my view, especially prejudicial and inappropriate in view of the fact that the export restrictions were extended. Those restrictions, which were introduced in 1982 and renegotiated in 1985, were — as pointed out above — extended in their present form until September 1989. And, as the Commission confirmed in the oral procedure, in the present circumstances it appears likely that they will be extended once more.

Consequently, there is no reason to believe that in principle the mechanism for allocating the licences must seek to maintain the respective positions of the exporting undertakings. It follows that the criterion of compliance with 'traditional export patterns' does not necessarily assume — as the German Government, the Italian Government and Hoesch claim — the character of a general rule in respect of which the case of a 'new producer' constitutes the sole exception, which is to be interpreted restrictively. It should also be pointed out in that particular regard that a restrictive interpretation of the criterion in question would in effect rule out almost completely any possibility of allowing for the emergence of a 'new producer'. It is in fact doubtful that in a market such as the one in question a new undertaking could emerge or that an undertaking that was already active in other markets could come on the scene.

8. The view that the criterion of compliance with traditional export patterns does not constitute the only rule which must be observed is confirmed by the methodology of Article 5.

As the Court observed in its judgment of 17 March 1987 in Case 333/85

Mannesmann-Röhrenwerke v *Council* [1987] ECR 1381, Member States, when issuing export licences within the limits laid down,

'must take due account of certain criteria which may be objective but whose implementation involves the exercise of a discretion and whose significance must be determined having regard to the *combination of different criteria*' (my emphasis).

That decision states something which is, moreover, already quite evident from the wording of Article 5(2), namely that the licences in question are allocated by the national authorities on the basis of a discretionary assessment of a *combination of different criteria.*

One of those criteria, 'traditional export patterns', is a *static* one. However, even though that criterion is particularly significant for reasons of administrative practicality, it must also be reconciled — independently of the criterion of the 'new producer' — with considerations which concern aspects which are inherent in the *dynamic* nature of the market. I refer here in particular to the last two indents of Article 5(2), where it is stated that the *optimum use and administration* of the export possibilities afforded by the regulation are also to be taken into account. Those last criteria are guided by considerations which could be summed up as efficiency of allocation, and not merely the preservation of existing market positions.

The simultaneous application of those criteria may, of course, lead to convergent results. It may turn out to be the case that issuing licences for more exports to the undertaking which in the past has exported most, and which has thereby shown itself to be more competitive, meets the objective of optimum management of the national quota.

However, the application of those criteria may also give rise to divergent results. For example, it may be appropriate to reduce proportionally the quotas of the largest 'traditional exporters' in order to increase the quota of an undertaking which has obtained a particularly advantageous contract, possibly long-term, to supply tubes to the United States of America.

It is precisely such cases, in which the national authorities must carry out complex assessments of circumstances which are not clear-cut, which reveal clearly the discretionary power which the Court has recognized the national authorities possess and the scope of which, as has already been pointed out, 'must be determined having regard to the combination of different criteria'.

Thus, to summarize, even if we leave aside the reference to 'new producers', compliance with 'traditional export patterns' is not, as has been claimed, essentially the only criterion to be applied. Licences are issued on the basis of an analysis of the circumstances, which means that competing criteria are used, and that in the exercise of an assessment of a discretionary nature account is also taken of factors relating to economic efficiency.

That confirms what was stated above by way of principle, namely that under Article 5 compliance with traditional export patterns constitutes *one of the factors* to be taken into consideration in order to determine the allocation of the licences and is not the *purpose* of the allocation.

9. In the light of those considerations, we can also reject the argument that the term 'new producer' — as the sole exception to an almost all-embracing general criterion — must be interpreted restrictively.

In accordance with the overall logic of Article 5, the reference to 'new producers' must be understood not as an exception but as an explanation of a particular case in which criteria of a static nature must be tempered by circumstances which relate to the dynamics of the market. In other words, the Community legislature has, on the one hand, provided in general that the national authorities are always to take into consideration any new factors in the development of the market which may be relevant to the optimum management of the export possibilities and, on the other hand, it has expressly required the same national authorities to take account of a particular case of market change, that is to say the appearance of a 'new producer'.

That express provision would seem to imply that whenever such a case arises the Member States' discretion is less wide. They cannot, without good reason, allocate licences without taking account of the position of 'new producers'.

There is a very clear rationale behind that express provision. In such cases, not only is there a new factor in the way the market *functions* (as in the case of an undertaking which previously had played only a minor role in the export market but which wins a large, new order), but there is also a *structural* change in the market in question. That is why, logically, the national authorities cannot, as I have already said, completely ignore such a development, though they can make a discretionary, albeit reasoned, assessment of its relevance to the allocation of licences.

The express reference to 'new producers' in the second indent of Article 5(2) thus gives more substance to the expectations of operators whose position in the market has changed structurally. It also recognizes both the undoubted economic importance of such developments and the considerable difficulties which changes of that kind encounter in a market such as the one in question. Those difficulties relate to the enormous costs inherent in such operations and to the considerable investment risks.

If that is why express provision has been made for the case of 'new producers', then that is another reason for rejecting a strict interpretation according to which that concept is limited either to undertakings which are completely new or to undertakings which previously operated in different markets.

If it is a structural change in the market that the regulation requires to be taken into account, it must be recognized that such

changes manifest themselves, in economic terms, not only when a 'newcomer' appears on the scene, but also when an undertaking which is already present in the market in question, by investing very heavily, makes radical changes to its management and business structure, thereby developing new business strategies and creating a production capacity which is in no way comparable to its previous production capacity.

In the event that such changes take place it is obvious that the market structure is no longer the same market structure as existed before. The radical transformation brought about has, in effect, led to the creation of a *new competitor,* thereby substantially changing the relationship between the rival operators in marketing terms.

It would therefore be inappropriate to argue that changes of such magnitude are not covered by the term 'new producer' used in the regulation in question; the effect of those changes on the structure of the market is at least as great as the effect of a change brought about by the entry of an undertaking which previously manufactured different products.

Moreover, it should also be emphasized that, as the Commission rightly pointed out, it is difficult, if not impossible, to determine the dividing line between circumstances which constitute a radical transformation of a company's product range and management structure and cases which represent the appearance of a new undertaking, that is to say a distinct legal person. In fact, changes such as those put into effect in the present case by Bergrohr, which of necessity require very considerable financial commitment, may very well have led not to the restructuring of the company but to the creation of a genuine subsidiary. In the latter case, in which there is no real, substantial difference, there is no doubt that there would be a distinct legal person to which the status of 'new producer' could not be denied.

It would not be reasonable or consistent with a correct reading of the relevant provisions of the regulation to make additional export licences available *only* if the undertaking's business and management structure have changed, and not if substantial changes have occurred on the market. That interpretation is not only contrary to the logic of the regulation, it is also, in my opinion, *discriminatory* since it would entail different treatment of situations which, from an economic point of view, are substantially similar.

On the other hand, the German Government claims that if the status of 'new producer' is also to be granted to undertakings which have radically transformed their structure, it would be necessary to carry out especially complex investigations which the national authorities would not, in any event, be able to complete in the short time allowed by Community legislation for granting the licences.

In my opinion, those observations are not conclusive either. In particular, I do not believe that in cases such as the one under consideration there is any real difficulty in establishing who is a 'new producer'. The

changes put into effect by Bergrohr are so extensive and pronounced that it cannot be denied that the structure of the market has changed.

More generally, it should be pointed out that, as confirmed by the Court in its judgment in *Mannesmann-Röhrenwerke*, the same regulation requires national authorities to issue licences on the basis of a discretionary assessment of a number of competing criteria. And we have seen that among those criteria there are a number which involve the consideration of economic factors relating to the dynamics of the market in question, which are without a doubt just as difficult to assess as the one which concerns us here.

I therefore conclude that the term 'new producer', within the meaning of the second indent of Article 5(2) of Regulation No 60/85, may be applied to an undertaking which already produces pipes and tubes but which, by altering its management and business structure, considerably increases its production capacity and as a consequence succeeds in changing appreciably its position on the relevant market in relation to its competitors.

10. Having replied in the affirmative to the first part of the first question, I must now consider the next part.

The national court points out that the changes which may justify recognition of Bergrohr's status as a 'new producer' were made about one year before the arrangement on restrictions entered into force, and asks whether that circumstance prevents recognition of Bergrohr as a 'new producer'.

It should be pointed out in that connection that the national court also stated that the restructuring of the company was completed shortly before the conclusion of the arrangement between the European Community and the United States and that an undertaking which has completely changed its production facilities must normally be allowed a certain period of time before those changes can be translated into effective economic activity, and therefore into new export patterns. In particular, Bergrohr has pointed out that in the market in question the preparatory stage for a project which is based on a restructuring of production facilities requires approximately one and a half years.

Consequently, even if, in the present case, the new works was completed before the arrangement between the European Community and the United States was concluded, it was only later that it actually started producing. In that case, the status of 'new producer' was acquired after the export restrictions entered into force. There is therefore no reason to exclude it from the scope of the second indent of Article 5(2).

However, it must be pointed out that it is for the national court to rule on that matter. In particular, it will be necessary to verify whether the changes in the company structure were actually made shortly before the arrangement entered into force and whether, consequently, it was only later that those changes produced operating results.

11. In the third part of its first question, the national court asks the Court of Justice whether, having regard to the national authorities' discretion in the issuing of licences, there are nevertheless criteria for assessing the position of a 'new producer' for the purposes of allocating licences among the undertakings concerned.

In that regard, I would recall that, under the third recital in the preamble to Regulation No 60/85, the Member States must share out the amounts allocated to them among undertakings in accordance with *objective criteria.*

In the event that account must be taken of the situation of a 'new producer', the national authorities must generally ensure that there is some proportional relationship between the changes made and the licences issued as a consequence. It would not be permissible for significant changes in undertakings not to be reflected in any concrete way when the licences are issued.

In order to ensure that there is a proportional relationship of that kind, the national authorities must take account of a series of objective factors such as the increase in production capacity, the difference in competitiveness and the likelihood that the licences applied for will actually be used. They must also take account of the economic position of the other applicant undertakings, of the exports of those undertakings during the reference period and of the likelihood that the licences will be used.

It is clear that that entire assessment remains discretionary. Nevertheless, since it is based on an appraisal of objective circumstances an adequate statement of reasons will need to be provided and consequently it will be subject to review.

Of course, the greater the significance which, in any given case, is attributed to the situation of a 'new producer' for the purposes of issuing licences, the more the quotas granted to the 'traditional exporters' will be reduced in proportion. Those traditional exporters, however, are not entitled to licences under the regulation; they have a mere expectation, since they are aware of the fact that the criterion of traditional export patterns must be tempered by other criteria; in particular, licences due by virtue of previous exports may be reduced when new factors arise which affect the functioning or structure of the market.

In short, when assessing the position of a 'new producer' for the purpose of issuing export licences pursuant to Regulation No 60/85, the national authorities, under the discretionary power to appraise conferred on them by the regulation in question, are required to take into account a series of objective factors, thereby ensuring that there is a sufficiently proportional relationship between the changes made by the undertaking which is recognized as a 'new producer' and the licences which are issued to that undertaking, and also taking account of any factors affecting the positions of the other applicant undertakings.

12. In the second question the national court asks the Court of Justice whether the German authorities are required or authorized to issue preferentially to Hoesch export licences for 20 000 tonnes, to be deducted from the national quota.

In the order making the reference the national court expresses grave doubts in that regard.

On the other hand, the German Government, the Italian Government, Hoesch and, in particular, the Commission consider that it is evident from the applicable measures that there is provision for a special quota for Hoesch.

Let me say straight away that the grant of an extra quota of that kind to Hoesch would constitute an exception to the criteria which apply to all the other undertakings in the Community for the issuing of licences: as such, therefore, it would have to be expressly provided for by an act which produces legal effects in the legal order of the Member State concerned.

However, the relevant regulation — Regulation No 60/85 — quite clearly does not contain any provision in that regard.

Nor is there any basis to the argument, put forward in particular by the Commission, that the extra quota in question was provided for in Regulation No 3686/87, which was adopted subsequently and which amended Article 5(2) of Regulation No 60/85. That amendment, according to the Commission, merely expands a provision which was already laid down in outline in the previous formulation of Article 5(2).

Nor was I able to find in Regulation No 3686/87, despite a number of readings, the specific provision relied on by the Commission in support of its claim that the allocation to Hoesch of a special quota of 20 000 tonnes was lawful. The regulation in question makes only a reference of a *generic* nature to the situation of '*undertakings* with a subsidiary in the United States' (see the second and third recitals and Article 1), without naming a specific Community undertaking. Moreover, it lays down a criterion in addition to those already provided for in Article 5(2) of Regulation No 60/85 in relation to the issuing of licences *in the entire Community* whereas, on careful consideration, the present case concerns the question whether, with regard to the *allocation of the German quota*, there is an exceptional provision which requires or authorizes the preferential allocation to Hoesch of 20 000 tonnes, particularly as other European undertakings might also have had and might have subsidiaries in the United States, certainly including Bergrohr, as is evident from the order making the reference.

In any event, Regulation No 3686/87 is a regulation which *amends* a system which is already in existence; it amends Article 5(2) in view of the need to '*add* to the list of criteria laid down for the issue of licences by the Member States in the case of Community undertakings which have a subsidiary in the United States'.

As we know, except in exceptional cases, amendments to legislation are not retroactive.

Moreover, the fact that it was necessary to amend Regulation No 60/85 to add the case of undertakings with subsidiaries in the United States means that that criterion was previously excluded from the legislative scope of the regulation.

To argue, as the Commission does, that subsequent amendments explain or, if you like, confirm provisions which were previously not laid down is rash, to say the least, from the point of view of general legal theory and also from the point of view of Community law, since it would constitute an easy way of eluding the principle that a law cannot be retroactive and would result in a clear infringement of the principle of legal certainty and of the principle of legality. Let me also point out that on a recent occasion the Court rightly rejected a similar argument, taking the view that when account is taken of a new case by means of an amendment to a regulation, the case in question may not be regarded as having already been provided for in the period prior to the adoption of a supplementary amendment of that kind. [6]

13. With regard to the arrangement between the EEC and the United States, it should be pointed out that there is no specific provision for the allocation of a special quota to Hoesch in that document either.

I would also point out that the Court has held that:

'a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. [7]

In the present case those conditions are not met. As has already been stated, the arrangement does not provide for, or even envisage, an obligation to allocate a special quota to Hoesch.

Of course, I do not wish to deny that the guarantee that Hoesch would supply tubes to its American subsidiary to a total of some 85 000 tonnes — as is evident from the documents adduced — was one of the conditions imposed for increasing the Community quota from 5.9 to 7.6% of the United States apparent consumption. Consequently, those supplies, as the national court also points out, appear, in effect, to have been one of the leading factors in the negotiations with the United States.

Nevertheless, that aspect — which, however, does not emerge from the arrangement but only from the documents and the arguments presented in the case — is unrelated to the

6 — See the judgment of 28 February 1989 in Case 201/87 *Cargill BV* v *Produktschap voor Margarine, Vetten en Oliën* [1989] ECR 489.

7 — Judgment of 30 September 1987 in Case 12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] ECR 3719.

distinct problem of the *distribution among the Member States* of the total special quota (approximately 85 000 tonnes) granted to Hoesch, a distribution from which it would be possible to derive, as a consequence, an allocation to Hoesch of a special reserve of 20 000 tonnes *from the German quota.*

That specific problem was not and could not be settled in the arrangement since the proportion of the 85 000 tonnes which was to go to each of the Member States was a problem which was *purely internal* to the Community.

The questions referred by the national court concern precisely the legal basis of that allocation. The national court asks whether there is a legal measure, which produces legal effects in national law, from which it can be derived that, following the allocation in question, 20 000 tonnes must or may be reserved for Hoesch from the national quota allocated to the Federal Republic of Germany. However, since a measure of that kind — which, however, does not exist — is an internal Community matter, it could not logically come within the scope of the arrangement with the United States.

14. In fact — and this is the last point to be considered — the only documentary support for charging Hoesch's special quota to the various Member States is in the Council's decision of 29 December 1984 concerning 'authorization of negotiations for an arrangement with the United States concerning the export of steel pipes and tubes'.

That decision, which authorizes the Commission to negotiate the arrangement in accordance with certain instructions, contains the following declaration made by the German Government:

'The German Government has indicated that it would be prepared, in order to reach a common position, to take a part of the exemption which had been initially foreseen in the context of related parties for Hoesch (65 000 tonnes out of 85 000 tonnes) in its share in the burden sharing on condition that the other Member States were prepared to take 20 000 tonnes on their quotas. In this case the burden sharing would be as follows:

B	0.48
DK	—
D	2.82
GR	0.52
F	0.93
I	2.00
L	0.17
NL	0.28
UK	0.40
Total	7.60'

The figures relating to 'burden sharing' given above are the same as those in Annex III to Regulation No 60/85. Moreover, the German Government's declaration actually refers to a quantity of 20 000 tonnes to be reserved for Hoesch as part of its national quota (2.82%) by virtue of a proportional reduction of the respective quotas of the Member States.

Can those elements be considered sufficient to constitute a *proper basis in Community law* for the allocation of a special quota of

20 000 tonnes to Hoesch, in other words an obligation or an authorization given to the German authorities, as the national court asks?

In my opinion, unless we wish to disregard the principle of legality, the reply can only be in the negative. My opinion is based on considerations which relate both to the nature of the abovementioned Council decision and to the nature and contents of the declaration of the German Government referred to above.

First of all, it should be recalled that — as was recognized in the oral procedure — the abovementioned decision is what is known as a decision *sui generis*, in other words an act which does not fall under one of the headings listed in Article 189 of the Treaty: it is therefore an act which, unlike decisions in the strict sense, is not binding and does not have full legal effects. [8]

Secondly, the decision in question, in so far as it is an authorization to negotiate, is a preparatory step in the procedure leading to the conclusion of an international agreement. The contents of that agreement may very well be different from the negotiating instructions previously given. Those instructions may be changed subsequently during the negotiations. That, incidentally, happened in the case at issue. The Council, by a decision of 24 November 1984, gave the Commission another authorization to negotiate which contained a specific point, 'livraison à des filiales aux États-Unis de matériaux semi-finis', which did not appear in the authorization of 29 December.

Leaving aside the effects which a preparatory measure of that kind produces in the relationships between the institutions, it cannot be accepted that it is in any way binding on the Member States and individuals. In principle, only the final act which brings the procedure in question to an end is recognized as binding. And that is why, in general, definitive acts of that kind can be challenged whereas preparatory acts cannot.

Thirdly, it should be pointed out that, in accordance with the principle of legality, in the context of the Community, legal situations involving rights, powers or obligations must have as their source an act which the Community legal order recognizes as binding. Only acts which are in their definitive form are sources of law. On the other hand, no legislative significance, or even merely interpretative value, can be attributed to those internal acts which come into existence during the Community legislative process.

Moreover, that is consistent with the case-law of the Court of Justice according to which:

'. . . unilateral declarations [entered in the Council Minutes during the preparatory work] cannot be relied upon for the interpretation of Community measures, since the objective scope of rules laid down by the common institutions cannot be modified by reservations or objections which Member States may have made at the time the rules were being formulated'. [9]

8 — See R. Joliet: *Le droit institutionnel des Communautés européennes*, 1983, p. 184.

9 — See the judgment of 30 January 1985 in Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paragraph 13.

Similarly, the Court has held that:

'... an interpretation based on a declaration by the Council cannot give rise to an interpretation different from that resulting from the actual wording [of the act in question]'. [10]

Accordingly, in the present case it will not be possible to rely on the contents of the German Government's declaration contained in the Minutes of the meeting of the Council which adopted the authorization to negotiate. It is the contents of the acts adopted subsequently as a result of those negotiations to which reference will have to be made. Such acts are the only ones which, as I have already stated, produce full legal effects. The acts in question are Regulation No 59/85, which approves the conclusion of the arrangement between the EEC and the United States, and Regulation No 60/85, which contains the provisions necessary for the implementation of the arrangement within the Community. However, as I have already emphasized, in neither of the regulations is there any provision concerning a special quota of 20 000 tonnes for Hoesch to be deducted from the German national quota. Moreover, that situation remained unchanged following the adoption of Regulation No 3686/87.

Fourthly, it should be pointed out that the Council decision cited above and the relevant declaration of the German Government were not publicized in any way, as was confirmed in the hearing. However, even it if is accepted that the acts in question have some legal significance, their contents cannot be applicable to those concerned. As the Court has held:

'A fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it'. [11]

Fifthly, and finally, contrary to what has been claimed in these proceedings, it is not true that the question of the allocation of a special quota to Hoesch for supplies to its American subsidiary was definitively settled by the Council's decision of 29 December 1984. The documents produced by the Commission, which include copious correspondence between the German, Community and United States authorities, show that:

(a) the special supplies to the American subsidiary of Hoesch were not delivered in full, at least up to July 1985 (in particular, the Americans complained repeatedly that 42 000 tonnes of OCTG tubes were not delivered);

(b) the allocation of Hoesch's special quantity among the quotas of the Member States was not settled either by the decision in question or by Regulation No 60/85 (in particular, in a letter of 5 February 1985 to the President of the Council of Ministers

10 — See the judgment of 23 February 1988 in Case 429/85 *Commission* v *Italy* [1988] ECR 843, paragraph 9.

11 — See the judgments of 25 January 1979 in Case 98/78 *Racke* v *Hauptzollamt Mainz* [1979] ECR 69, paragraph 15, and in Case 99/78 *Decker* v *Hauptzollamt Landau* [1979] ECR 101, paragraph 3.

for Industry of the Community, the Minister for the Economy of the Federal Republic of Germany stated that the way in which Hoesch's special quota of 20 000 tonnes was to be shared out among the Member States had yet to be decided; he also suggested two different possible solutions and stated, however, that that quantity was manifestly insufficient for German requirements);

(c) those two matters do not seem to have been finally settled until 6 August 1985 when Council Regulation No 2355/85 was adopted which completed, albeit belatedly, Annex III to Regulation No 60/85 and determined the way in which the Member States would share the burden with regard to OCTG tubes.

In view of those factors, it cannot, in my opinion, be argued that the abovementioned Council Decision of 29 December 1984 — regardless of its legal validity — has clearly and definitively settled either the question of the special quantity to be reserved for Hoesch or the way which the total amount of that quantity must be shared out among the quotas allocated to each of the Member States.

In conclusion there is, in my view, no legislation permitting the allocation to Hoesch of a special quantity of 20 000 tonnes to be deducted from the total German quota and, in any event, there is no provision which is applicable to the other undertakings concerned.

Accordingly, I believe that the parties who have proposed that the answer to the national court's second question should be in the affirmative rely on an incorrect interpretation of the applicable legislation and, in fact, ask the Court to attribute force of law to expressions of will or intention which are merely a part of the institutions' internal deliberation procedure. If such expressions were to be regarded as binding in law, both public authorities and citizens would be bound not only by the objective contents of a law, but also by provisions of a highly political nature which are not laid down in any formal legislative act. And that is a result which I consider to be completely — and without a shadow of a doubt — incompatible with the fundamental guarantee provided by the rationale of the principle of legality as it exists in the legal orders of the Member States and of the Community.

In view of the above, I propose that the following reply should be given to the national court:

'(1) (a) The term "new producer" within the meaning of the second indent of Article 5(2) of Regulation No 60/85 covers the case in which an undertaking which already produces pipes and tubes, by changing its

management and business structure, greatly increases its productive capacity and, as a consequence, brings about an appreciable change in its market position in relation to its competitors.

(b) Recognition of an undertaking's status as a "new producer" is not precluded by the fact that the changes in management and business structure made by that undertaking were completed before the arrangement on export restrictions between the EEC and the United States entered into force, provided that those changes produced a real possibility of exporting to the United States only after the arrangement entered into force. It is for the national court to ascertain whether that condition was met in each particular case.

(c) When taking account of the position of a "new producer" for the purposes of issuing export licences pursuant to Regulation No 60/85, the national authorities, in the exercise of their discretionary power of appraisal under that regulation, are required to take into consideration a combination of objective factors, thereby ensuring that there is a sufficiently proportional relationship between the changes made by the undertaking which is recognized as a "new producer" and the licences which are issued to that undertaking, and also taking account of any factors affecting the positions of the other applicant undertakings.

(2) In the present state of applicable Community legislation, there is no legal measure which requires or authorizes the authorities of the Federal Republic of Germany to allocate preferentially to Hoesch export licences for a special quantity of 20 000 tonnes of tubes, to be deducted from the national quota.'