2. For the rest, dismisses the application;

3. Orders the parties to bear their own costs.

Mertens de Wilmars Touffait Due

Mackenzie Stuart O'Keeffe Koopmans Everling

Delivered in open court in Luxembourg on 28 October 1981.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 25 JUNE 1981 [1]

Mr President,
Members of the Court,

In autumn 1980 the Commission noted that in the course of the third quarter of that year there had been a sudden and considerable drop in the demand for steel, that the rate of utilization of the steel undertakings of the Community had fallen sharply and that in the Community there had been a marked fall in steel prices which had coincided with an increase in manufacturing costs. This led the Commission to assume that the European steel industry was confronted with a period of "manifest crisis". Since the Commission was convinced that the indirect means of action provided for in Article 57 of the ECSC Treaty were not adequate, and that it was necessary to take direct and binding measures in the sphere of production in order to restore equilibrium between supply and demand, it decided to apply Article 58 of the ECSC Treaty and to introduce a system of production quotas. This was done by Decision No 2794/80/ECSC of 31 October 1980 which was published in the

1 — Translated from the German.

Official Journal of the same day (L 291, p. 1) and, pursuant to Article 15 thereof, came into force on that day.

That decision laid down for undertakings in the steel industry — beginning with the fourth quarter of 1980 and, by virtue of Article 15, limited to a period ending on 30 June 1981 — quarterly production quotas for crude steel and for four groups of rolled products which are listed in Article 2 of the decision. In this respect the so-called reference production figures play a decisive part. Under Article 4, point 1, of the decision they are in principle calculated in such a way that for each month of the relevant quarter reference is to be made to the same month during the period from July 1977 to June 1980 during which the total production of the four groups of rolled products was the highest. The three months thus chosen, which do not have to be consecutive, constitute the reference period. According to Article 4, point 2, of the decision the reference production figures are to be the same, for crude steel and for each of the other groups of rolled products, as the production of the corresponding items during the reference period. In addition points 3 to 5 of Article 4 of the decision provide various possibilities for adapting the reference production figures. How these are organized will be shown in a later context in so far as they are relevant to the present proceedings.

On the basis of the reference production figures certain rates of abatement are fixed. For the fourth quarter of 1980 these are laid down as regards the four groups of rolled products in Article 5, point 1, of the decision; for the first quarter of 1981 they are to be found in Decision No 3381/80/ECSC of 23 December 1980 (Official Journal L 355 of 30. 12. 1980, p. 37). As for crude steel, the abatement has to be individually fixed for each undertaking since in the case of each undertaking the four groups of rolled products make up a different proportion of their total production. Article 5, point 2, of Decision No 2794/80/ECSC contains the necessary provisions for that purpose.

Under Article 7 (1) of the last-mentioned decision "undertakings must comply with the production quotas notified to them by the Commission". Article 7 (2) of the decision provides in addition:

"With regard to the delivery of products subject to the quota system, undertakings may not exceed, by group of products, for deliveries within the common market, the ratio of Community deliveries to total deliveries in those twelve months of the period from July 1977 to June 1980 in which the total production of the four groups of rolled products was the highest".

Article 9 of the decision provides that undertakings "which exceed their production quota or that part of this quota which, under Article 7 (2) and (3), may be delivered within the common market" are to be fined.

Finally Article 14 of the decision provides:

"Where the production or delivery restrictions imposed by this decision or its implementing measures entail exceptional problems for an undertaking, it may refer the matter to the Commission, providing all appropriate supporting documentation.

The Commission shall examine the case without delay, in the light of the objectives of this decision.

Where appropriate, the Commission shall adapt the provisions of this decision."

In respect of the fourth quarter of 1980 the applicant in these proceedings, which produces and processes steel, received a notification, within the meaning of Article 3 (2) of the decision, of reference production figures and production quotas for rolled products and crude steel, that notification being dated 1 November 1980. The notification stated *inter alia* that the reference production figures had been adapted "pursuant to Article 4"; in the event of non-compliance with the provisions of Decision No 2794/80/ECSC financial penalties would be imposed. The notification was apparently explained orally to the applicant and it was made clear that the reference production figures had been adapted pursuant to Article 4, point 5, of the decision, that is to say, on account of the implementation of restructuring measures the effect of which was that the total production of the four groups of rolled products was lower in the fourth quarter of 1980 than in the fourth quarter of 1974 and yet the balance sheet for 1979 revealed a profit. This latter point was once again repeated in a letter from the Commission dated 1 December 1980 in which it was emphasized, as it had been in a discussion on 19 November 1980, that the notification constituted a binding decision.

The applicant objected to the notification and applied to the Commission by letter of 3 December 1980 for an increase in the reference production for Group 1 products as well as for crude steel, this time under Article 4, point 4, of the decision, in view of the fact that after 1 July 1980, in pursuance of an investment programme which it had reported and on which the Commission had not given an unfavourable opinion, it had commissioned a third pre-heating furnace in its hot-rolled wide-strip mill. This resulted in the total production capacity of all four groups of products being increased to a level which exceeded the total production capacity of 1979 by more than 15%.

Before this application was decided the applicant brought the matter before the Court on 11 December 1980 by instituting the proceedings in Case No 275/80. The applicant asks that the notification of the Commission dated 1 November 1980 should be declared void in so far as it lays down production quotas for hot-rolled wide and narrow strip (Article 2 of the decision — Group I products).

By letter of 23 December 1980 the applicant was then notified by the Commission that the conditions which had to be satisfied for an increase in the reference production under Article 4, point 4, had not been fulfilled in the fourth quarter of 1980 because from the information given by the applicant itself in questionnaire 2-61 the increase in capacity in 1980 had only amounted to 9.35%. At the same time the Commission explained that as regards the first quarter of 1981 a possible application of the abovementioned provision was still being examined.

As regards the first quarter of 1981 — and here I come to the facts in Case 24/81 — the applicant received a notification, issued under Article 3 of Decision No 2794/80/ECSC and dated 19 December 1980, concerning reference production figures adapted pursuant to Article 4 and production quotas for rolled products as well as for crude steel after application of the abatement rates prescribed by Decision No 3381/80/ECSC. In this regard, too, it is said that it was explained verbally that only the

rules contained in Article 4, point 5, on the increase of reference production figures had been applied.

On 9 February 1981 the applicant brought an action before the Court. It asks that the notification of 19 December 1980 be declared void in so far as it determines production quotas for hot-rolled wide and narrow strip and for crude steel. On the same day as the application was received at the Court the Commission wrote a letter to the applicant giving the result of the examination mentioned in the letter of 23 December 1980 regarding the application of Article 4, point 4, to the first quarter of 1981. In that letter it was acknowledged that the conditions for the application of Article 4, point 4, as regards Group 1 had been met because the activation of plant after 1 July 1980 and the new production possibilities thus established for Group 1 had brought the total production possibilities for the four groups of products in the year 1981 to a level exceeding by 16.98% the production possibilities existing for 1979. Since this result was more favourable than the one contained in the letter of 19 December 1980 and based on Article 4, point 5, it was to supersede the earlier result. For Group 1 products and for crude steel new reference production figures and new production quotas were accordingly determined for the first quarter of 1981; for the rest, the notification of 19 December 1980 remained in force.

This prompted the applicant to lodge an additional application on 10 March 1981 for the notification of 19 December 1980 as amended by the notification of 9 February 1981 to be declared void in so far as the notification determined production quotas for hot-rolled wide and narrow strip and for crude steel.

My views on these applications, which the Commission says should be dismissed as unfounded, are as follows:

I — Admissibility

1. In its first application the applicant has made long submissions on admissibility. This is so because when the disputed notification was issued the provisions contained in Decision No 22/60 of 7 September 1960 (Official Journal, English Special Edition, September 1974, Second Series VIII, p. 13) on the formalities to be observed when issuing decisions, recommendations and opinions had not been complied with in various respects (which I will deal with individually later) and that subsequent to that decision it had been explained in a communication printed in the Journal Officiel No 61 of 29. 9. 1960, p. 1250 that those concerned might assume that if the formalities prescribed in Decision No 22/60 had not been observed, the measures in question were not legally binding.

The applicant itself is of the view, however, that this is not conclusive. It refers in this connection to the relevant case-law as it had developed not only before the issue of the decision but also afterwards, and indeed up to the date of the EEC Treaty. It submits that it is clear from this case-law that no *formal* criteria are conclusive in the case of the concept of a decision, that is to say, of an act which may be contested before the Court. What is essential is the *content* of a statement and in particular whether it is designed to produce legal effects in a given case. This is certainly true of the notifications at issue here. On the one

hand Article 7 (1) of Decision No 2794/80/ECSC speaks of the obligation to "adhere to the production quotas notified by the Commission". It is clear from this that those notifications, whose content moreover, in any event in so far as the application of Article 4, points 3 and 4 is concerned, can only be determined by the Commission, serve the purpose of giving specific effect to a provision contained in General Decision No 2794/80/ECSC. On the other hand Article 9 of the decision, with its threat of fines, can likewise only be given effect by means of the notifications provided for in Article 3.

The Commission has not disputed the applicant's view on this point. As early as 1 December 1980, in its letter of that date to the applicant, the Commission expressly declared that the notifications addressed to the undertakings under Article 3 of the general decision were binding decisions. The Commission reinforced this point of view in the proceedings before the Court by agreeing with the applicant's view that Articles 7 and 9 of the general decision are imperfect legal norms awaiting completion by means of the notifications from the Commission and by stressing that specific obligations are only imposed on the undertakings by virtue of the general decision *in conjunction* with the production quotas notified to them.

I can only agree with this and find as a result that there is no reason to question the admissibility of the applications on the ground that the contested measures do not have the characteristics of decisions.

2. As regards the admissibility of *individual submissions*, some of which go to the legality of General Decision No 2794/80/ECSC, and are, as we know, the subject of dispute, this is a matter to which I will later return.

II — On the substance of the cases

In considering whether the applications are well founded I shall deal first with the criticism, common to both applications, concerning the infringement of essential procedural requirements. I shall then consider in particular the notification of 1 November 1980 (Case No 275/80). This will involve essentially the interpretation to be given to Article 4, point 4, of Decision No 2794/80/ECSC. Next, the notification of 19 December 1980, as amended by letter of 9 February 1981, will be examined in regard to the question whether the rules on increases set out respectively under points 4 and 5 of Article 4 of Decision No 2794/80/ECSC may be applied concurrently or alternatively. Finally, it will be necessary to deal with two further objections regarding the alleged illegality of the general decision one of which relates to Article 4, point 4, and the other to Article 7 (2).

1. Infringement of essential procedural requirements

(a) In this connection I must first of all deal with the criticism, which I have already touched upon in relation to the question of the admissibility of the applications, that the requirements laid down in Decision No 22/60 were not observed.

(aa) The applicant points out that according to the abovementioned decision, a decision must be expressly

described as such in its title, that the date of its adoption by the High Authority (now the Commission) must be shown and that, with the addition of the words "for the High Authority" (now "for the Commission"), it must be undersigned by a member of the Commission (Article 1). Furthermore decisions must be set out in articles (Article 3) and must be notified either by registered post with receipted delivery or by direct delivery to an authorized recipient against receipt (Article 4). None of these requirements were observed in the case of the notifications by the Commission. In particular the applicant complains that the notifications contain no indication that the original document was signed and considers that it may be assumed from the fact that it was produced in the computer centre that the signature has been overlooked. In addition the applicant stresses that the notifications were signed "in the name of the Commission" by one member of the Commission. This indicates, as does the absence of any indication of the adoption of a decision by the Commission, that there was no decision adopted by the members of the Commission as a body but only one adopted by an authorized member of the Commission.

In its defence to these objections the Commission's main contention is that the provisions of Decision No 22/60 are not concerned with *essential* procedural requirements. In the proceedings before the Court the Commission is no longer maintaining the patently untenable view, which it expressed at an earlier stage in regard to the applicant, that since the merger of the High Authority with the Euratom and EEC Commissions Decision No 22/60 has no longer been applicable, that is to say, even though it was not expressly repealed.

(bb) It seems to me, if I may say so right away, that Decision No 22/60 can provide no assistance towards enabling the applications to succeed.

In my opinion it is perfectly clear that in any event the question is not one of essential procedural requirements within the meaning of Article 33 of the ECSC Treaty inasmuch as Decision No 22/60 states that a decision must be expressly described as such in its title, that it should be set out in articles and that it should be notified by registered post with receipted delivery. If a decision is clearly identifiable as such from its content it would indeed be absurd to declare it void merely because it does not expressly bear this description. The same applies to the requirement, stipulated in the interests of clarity and ease of reference, that it be set out in articles, for failure to do so can hardly be said to have any effect on the content of a statement. It is clear that the requirement of notification by registered post with receipted delivery is a step which comes *after* the decision has been taken. It cannot therefore have any effect on the content of the decision. At most it might be significant in determining whether a time-limit for instituting proceedings had been observed. This problem does not however arise in this case since it is not disputed that the notifications reached the applicant.

Furthermore, as regards the fact that in the notifications the date of the adoption of the decision by the Commission is not shown, this does not, according to the submissions of the Commission, justify the conclusion that there was merely a decision of a duly authorized member of the Commission but not of the Commission itself. In truth, according to the Commission there was a perfectly proper decision of the Commission

which was in accordance with Article 27 (1) of the Rules of Procedure in force for the time being, that is to say, a decision *authorizing* one of its members to take "measures relating to the business of the Commission and of its administration". In point of fact this assurance, which is not denied, should be sufficient, just as there can be no doubt that the authority delegated to the commissioner is covered by Article 27 of the present Rules of Procedure, since fixing the production quotas is a purely arithmetical application of Decision No 2794/80/ECSC which contains all the necessary criteria for the purpose and does not leave any scope for discretion. If, however, no *indication* that a decision has been adopted by the Commission appears in the notifications, this cannot, in my opinion, be described as an infringement of an *essential* procedural requirement.

The same applies to the criticism concerning the signature of the notifications. It is only the applicant's supposition that there was no signature by hand of the original document. The fact however that the notifications contain no reference to the signature of the original documents and that they have not been signed "for the Commission" but "in the name of the Commission" cannot be considered as an infringement of a procedural requirement which could justify a declaration that the contested measures are void.

(b) The applicant also raises the objection — and this is the second aspect to be considered in the context of the first ground upon which the application is based — that the notifications which it received *did not contain an adequate statement of the reasons upon which they were based*, that is to say, that they did not satisfy a requirement which is mentioned not only in Decision No 22/60 but also in Article 15 of the ECSC Treaty and the importance of which the Court has repeatedly emphasized in its case-law.

The applicant states that it is not possible to ascertain how the reference production figures were adapted under Article 4 of Decision No 2794/80/ECSC. The particular provisions applied were not stated; similarly there is no explanation as to the result of the calculation — for instance in the form of information relating to the reference production figures or to statistical values and their calculation in the way, for example, that information is given in Article 4, point 4 (average annual rate of utilization). According to the applicant, the explanations given *verbally* at a later stage by the Commission should not be regarded as sufficient since in this way the limitation periods for taking proceedings are shortened, quite apart from the fact that the purpose of stating the reasons on which a decision is based is, according to the case-law, not merely to provide information for the addressee of the decision but also to make possible judicial review by the Court.

The Commission emphasizes on the other hand that a correct appraisal can only be reached by considering the totality of the system of which the notifications under Article 3 of Decision No 2794/80/ECSC form part. The fact of the matter is that the notifications merely serve to perfect the general decision which in itself contains all the factors to enable the calculations to be made. The notifications cannot therefore be expected to satisfy the same requirements as complete, independent decisions. If that be so, there can be no objection to the fact that the Commission, for the purpose of drawing up the notifications, programmed a computer the results of which can in fact

always be worked out by the addressees of the notification, as the applicant has shown in its originating applications.

I think that on this point, too, the view taken by the Commission is right.

On the one hand, the notifications under Article 3 of Decision No 2794/80/ECSC are in fact very closely interlocked with that decision and do not therefore need to repeat the criteria contained in it. On the other hand, the duty to give a statement of the reasons for a decision has already been considerably relaxed by the Court. Here I am thinking particularly of the judgment of the Court (quoted by the applicant itself) in Case 16/65 of 1 December 1965 (*Firma C. Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 827 et seq.). In that judgment it was held that the degree of precision of the statement of reasons must be weighed against practical realities and the time and technical facilities available for making a decision. Furthermore, there is no need to communicate all the relevant facts; it is much more a question of what is the necessary amount of information to be given to a party who is concerned by and *competent in* the matter in question.

Accordingly it may be said that the applicant could ascertain without difficulty which of the adaptation rules contained in Article 4 of Decision No 2794/80/ECSC was applied in its case. Moreover, this was mentioned expressly, as far as the first quarter of 1981 is concerned, in the Commission's letter of 9 February 1981. The fact, however, that the notification relating to the fourth quarter of 1980 did not mention the relevant numbered point of Article 4 of Decision No 2794/80/ECSC can hardly be considered as an infringement of an essential procedural requirement. It must also be admitted that the failure to mention the determinant base figures, namely the applicant's reference production figures, is of little consequence since they came from the applicant itself. As regards the individual calculations, the decisive point must surely be that they are already indicated in the general decision. There was therefore no need for any further explanation in the notifications, whilst any points which remained unclear could still be argued in the proceedings before the Court. Finally, as regards the statistical data which are criticized by the applicant and which in the present case are only of importance in connection with the application of Article 4, point 4, of Decision No 2794/80/ECSC, not only should it be said that the inclusion in a decision of all the elements of calculation can scarcely be required, but it must also be assumed that the applicant would have had no particular difficulty in gaining access to them.

It may therefore be said by way of summary that, in the light of the particular features of the quota system which requires the rapid transmission of notifications to a multitude of undertakings, there can be no objection in principle to the use of a computer and that the results so obtained on which the individual notifications are founded may be considered as sufficient to protect the interests of the undertakings concerned and as adequate for the purposes of judicial review, provided that one views the individual notifications in conjunction with the general decision and any additional verbal explanations which may be given by the Commission.

2. Notification of the production quotas for the fourth quarter of 1980

I mentioned at the outset that the applicant's reference production figures calculated in accordance with Article 4,

points 1 and 2, of Decision No 2794/80/ ECSC, that is to say, the *normal* reference production figures, were adapted by the Commission under Article 4, point 5 (that is to say increased) in the light of restructuring measures which the applicant had taken since 1974. The applicant considers that the Commission wrongly omitted to carry out an adaptation under Article 4, point 4, in view of the activation of a new plant after 1 July 1980. On a correct interpretation of this provision, it would have to be acknowledged that the conditions stipulated therein were satisfied in the applicant's case. In this way a greater increase would have been achieved even if it had not been appropriate — and the applicant thinks that it was — to apply simultaneously both sets of rules on increases, which would then have involved an increase in the reference production figures to a level far beyond that which the Commission considers to be the correct one.

(a) In this connection it should be said first of all that the applicant activated after 1 July 1980 a new pre-heating furnace and thereby made possible a more extensive utilization of its hot-rolled wide-strip mill. This investment was reported at the beginning of 1979. The Commission did not deliver an unfavourable opinion on it in spite of the surplus capacity in that sector, and thus did not find that this expansion conflicted with the general objectives set for the steel industry. The reason was apparently that through such a substantial modernization an increase in the production of high-grade and special steels became possible. To what extent the simultaneous closing of an old pre-heating furnace played any part in this is not quite clear but in any event it is not relevant to the present proceedings. I would merely recall the Commission's statement that there was such an assurance on the part of the applicant and that corresponding expectations were entertained by the Commission. An express condition to that effect and a legal obligation on the part of the applicant had, however, not been imposed. The applicant gave details of this investment at the beginning of the year 1980 on questionnaire 2-61 a copy of which was before us in Case No 24/81. It is clear from these particulars (details were requested of the maximum production possible in the course of a calendar year taking into account the probable rate of plant utilization) that by virtue of the new plant the applicant's production possibilities in the year 1980 compared with 1979 increased by 9.35%. On that basis the Commission formed the view that the conditions laid down under Article 4, point 4, of Decision No 2794/80/ECSC were not met because the decision states that the increase in production possibilities must be at least 15%.

(b) The applicant on the other hand takes the view that the Commission is wrong to equate the concept "production possibilities" within the meaning of Article 4, point 4, with the concept of maximum possible production used in the questionnaire. In its view it is not reasonable to proceed upon the basis of the difference from one calendar year to the next in the maximum possible production of an undertaking. What should be measured instead, according to the applicant, is the capacity of the plant itself. Thus the term "production possibility" should be defined, as it is in common parlance and in the theory of business administration, as the maximum possible rate of production of an undertaking on the assumption that at the time

of assessment the production possibility remains constant for a certain period, usually a year. It is also necessary to take as a basis a *theoretical* production possibility and not to take into account the specific kind of production system or the expected rate of utilization of an undertaking. In the present case this would mean disregarding the fact that the applicant to some extent converts high-grade and special steel ingots into hot-rolled wide strip, which requires more time than the production of ordinary steel. Thus on the basis mentioned above there would be recorded in the applicant's case an increase in production in 1980 of more than 18.7% as compared to 1979.

The applicant has advanced the following arguments in support of its point of view:

— It points out that Article 4, point 4, does not refer expressly to calendar years in connection with new production possibilities and considers that if "maximum possible production" within the meaning of questionnaire 2-61 had been meant then that unambiguous term would have been expressly used in Decision No 2794/80/ECSC;

— The applicant also takes the view that because there are only projected figures available for 1981, the position adopted by the Commission means that criteria would be applicable in respect of the first two quarters of 1981 which can only be reliably determined at the end of the year, that is to say, a long time after the expiry of the period of validity of the quota system. Furthermore, if periods of time are to be the governing factor then it follows from the scheme of the rules that quarterly periods rather than calendar years should be selected;

— In particular, support can be derived for the applicant's viewpoint from a consideration of the purpose of the rules and from the need to arrive at a broadly reasonable interpretation. The aim of the quota system is to bring about a reduction in capacity. According to the applicant the interpretation advocated by the Commission clearly conflicts with this aim since it forces undertakings who wish to obtain the benefit of Article 4, point 4, to postpone an intended reduction in capacity and by the same token it favours undertakings which do not reduce their capacity. Assuming, however, that it is only on condition that the activation of new plant is accompanied by a reduction in capacity that an unfavourable opinion under Article 4, point 4, will not be delivered, then it becomes clear, in the applicant's view, that that provision would never apply in the case of an increase in the reference production figures. This must be considered to be just as nonsensical as the consequence to which the Commission's view leads, namely that for a new plant to benefit from Article 4, point 4, the later it is activated the bigger it must be. Finally, it is not wrong, according to the applicant, to say that the Commission's viewpoint entails a discriminatory effect, in so far as reference production figures which are calculated solely under Article 4, points 1 and 2, do not have to suffer an abatement if parts of plant are shut down.

(c) The Commission does not find any of this persuasive. I am of the opinion that here too the Commission has the better arguments on its side.

(aa) For the purposes of Article 4, point 4, it is clearly not permissible, and the applicant does not seem to lay much stress on this point, to take as a basis the notion of *theoretical* capacity, that is to say, in the applicant's case, to ignore its

manufacturing structure and production planning and to pretend that it only produces ordinary steel, although it has extended its high-grade and special steel programme at the expense of ordinary steel production. This is particularly so when one considers that the purpose of the decision is to achieve a reduction in production and to restore equilibrium between supply and demand. It is the effects on the *market* which are contemplated and therefore the *only* sensible *criteria* are those which *relate to the market*, or in other words are based on actual production situations.

(bb) It must also be recognized that the increase in production possibilities is properly ascertained by a comparison of the maximum production possible for 1979 with that for 1980, even if this is not as clearly expressed in the relevant provision as it certainly might have been. A number of considerations may be mentioned in support of this proposition.

— It is necessary to recall once more the basic purpose of the rules, which is to achieve a reduction in production. This requires that new production possibilities should not be taken into account in every case. In this connection reference may be made to the detailed provisions of Article 4, point 4 (necessary minimum increase in capacity; absence of an unfavourable opinion by the Commission, in other words the compatibility of the planned increase with the general objectives set for the steel industry). In view of that purpose new production possibilities must moreover be carefully phased in, bearing in mind the need to neutralize for a time the increase in capacity. To treat the applicant as if its new plant had been in operation not from 1 July 1980 but throughout the whole of 1980 must be incompatible with that objective.

— The applicant itself apparently acknowledges that the relevant reference figure is the production existing for 1979, that is to say, the actual reported production for that year. Accordingly the same principle must be applied for 1980 and 1981, since only comparables can be compared, and thus the actual increase in production which, for the purposes of market regulation, is the only practicable criterion, must be ascertained. Such increase in production depends on many specific factors such as the capacity of plant already activated, additional purchases of raw material, the capacity of plant activated at a subsequent stage. It is not only because Article 4, point 4 always speaks in terms of periods of one year that the relevant period to be taken must always be a year. Another reason is that a period of one year is sufficiently representative because seasonal variations are adjusted and because the Commission does not have the necessary data available in the case of individual quarters.

— Not least it has to be admitted that there are practical considerations which militate in favour of the Commission's view. The undertakings were at all events required in the spring of 1980 to answer the Commission's inquiries on investments on questionnaire 2-61 relating to the years 1979, 1980 and 1981. Accordingly, it was natural, for the purpose of applying the quota rules, to prescribe determining criteria corresponding to those data and thus to avoid — as a general rule at least — long drawn-out disputes with the undertakings concerned.

(cc) On the other hand it also seems clear to me that the applicant's objections relating to problems concerning the abstention from using capacities are not convincing.

When the applicant states that Article 4, point 4 of Decision No 2794/80/ECSC cannot be applied in practice since any increase in capacity must apparently always be offset by closures, it surely misunderstands the viewpoint of the Commission. In the course of the proceedings we heard that no such rigidly conceived scheme was envisaged. It was rather a question of inquiring whether the activation of new plant appeared to be justifiable in the light of the general objectives set for the steel industry, thus also on grounds of modernization and restructuring. In this connection there have been a number of cases in practice, notably involving so called single-product manufacturers, where Article 4, point 4, was applied as early as the fourth quarter of 1980.

The applicant further considers that the interpretation advocated by the Commission would inevitably have the effect of delaying a reduction in capacity in order to avoid incurring a disadvantage in the application of Article 4, point 4, as a result of closures. The applicant is, however, overlooking the point that undertakings are not permitted to make such arrangements under the system established by Article 4, point 4. If the Commission makes the abstention from using certain capacities a condition for its not issuing an unfavourable opinion, the result will be — and rightly so — a reduction in capacity. If the Commission on the other hand considers closure not to be necessary, the undertakings will in all likelihood also refrain from closures.

With regard, however, to the comparison with undertakings in whose case only a *normal* reference production applies which is therefore not subject to any abatement in the event of a closure, there can be no question of discriminatory treatment since in such a case the issue is no way one of production *possibilities* or accordingly, their modification.

(d) As regards the notification of 1 November 1980 and the failure to apply Article 4, point 4, of Decision No 2794/80/ECSC it may therefore be said that the Commission has correctly interpreted that provision and cannot be criticized on the ground that it ought to have applied it since, according to the information given by the applicant in questionnaire 2-61, the increase in production in 1980 as against 1979 amounted only to 9.35%. It is as a result also clear that the problem of a concurrent or alternative application of Article 4, point 4 and 5, of Decision No 2794/80/ECSC is of no importance in regard to the examination of the notification for the fourth quarter of 1980.

3. Notification of the production quotas for the first quarter of 1981

The reference production figures in respect of the first quarter of 1981 were, as I described at the beginning, adapted under Article 4, point 5, of Decision No 2794/80/ECSC. Accordingly, in the application the objection was made, analogous to the argument relating to the production quotas for the fourth quarter of 1980, that Article 4, point 4, had not also been applied. After the Commission had subsequently applied Article 4, point 4, and, in fact, had applied it *instead* of Article 4, point 5, the applicant stated in a supplement to its application that the matter in dispute now concerned principally the failure to apply the latter provision. Since the applicant also stated that the increase in production had amounted to 18.69% and not 16.98% as assumed by the

Commission, it was not quite clear whether the applicant was also alleging that Article 4, point 4, had been incorrectly applied. On this point, however, the applicant stated in the oral proceedings in reply to a question to that effect that it was not criticizing the application of Article 4, point 4, in the first quarter of 1981. It is therefore not now necessary to go into the problems associated with this aspect of the matter. The only question of importance is whether Article 4, point 5, ought to have been applied *in addition*, in other words whether several provisions governing an increase in reference production figures should be applied cumulatively or alternatively.

(a) So far as this issue is concerned, both parties have based their reasons in the first place on the *wording* of Decision No 2794/80/ECSC. However, it is impossible to arrive at an unequivocal and compelling conclusion in this way.

It must indeed be admitted that, as the applicant has pointed out, nothing in the decision expressly states that in a given case only *one* provision on increases may be applied. Furthermore, certain formulations in the *statement of the reasons* on which the decision is based appear to support the applicant's view; for example, the fourth paragraph under heading 4, which, referring to Article 4, point 4, is introduced by the word "ferner" in German ("also" in English and "également" in French), and the English and French versions of the fifth paragraph which use similar terms. In truth, however, nothing solid is to be derived from this because there is no mention of a cumulative application in the actual text of the decision.

On the other hand the Commission draws attention to the fact that points 3 to 5 of Article 4 all refer to an increase in the "reference production" or "reference production figures", in other words in the normal reference production figures to be calculated under point 1 and 2. It also considers that to accept the applicant's argument would be tantamount to speaking instead of the adaptation of the *increased* reference production figures. However, on closer examination it may be seen that the applicant's point of view cannot be irrefutably challenged in this way. First, the applicant points out in this connection that the term "reference production" is not used uniformly in Articles 4 and 5 of the decision. In Article 4 it is used to mean the production calculated in accordance with points 1 and 2 of that article, whilst in Article 5 its meaning can certainly be taken to cover reference production figures which have already been increased. Moreover, it is not the applicant's view that in the case of cumulative application there must be a second increase on the basis of reference production figures which have already been adjusted; rather the applicant considers that where there are several adaptations these ought to be made in each case on the basis of the normal reference production, which in logic would not present any difficulties.

Thus an analysis of the wording of the decision shows at most that a cumulative application of the various rules concerning adaptation is not precluded.

(b) The Commission also refers to the *systematic* interrelationship of the rules in question. Its view is that it is obvious that the reference production figures are in normal cases those which fall to be calculated in accordance with Article 4, points 1 and 2, in other words they constitute the *actual* production during the reference period, whereas the adaptation rules laid down in Article 4, points 3 to 5, give rise to *notional* reference production figures. Those rules thus cover exceptional circumstances and as such must be restrictively interpreted. A cumulation could therefore only be regarded as permissible if there were an express provision to that effect. Equally

it should not be forgotten that the application of points 3 to 5 usually results in variable amounts of increases which would scarcely make sense, even if cumulation were at all permissible.

Against this the applicant has argued that it is not correct to speak in terms of the existence of a general rule subject to exceptions, in the sense meant by the Commission, because the effect of points 3 to 5 of Article 4 is to allow an addition to the normal reference production figures but not to supplant them. Furthermore, the Commission has not been able to prove the existence of a general rule according to which in a given case only one of several exceptions may apply.

The applicant's objections are *prima facie* not totally without foundation. There is in fact room for doubt as to whether there was written into Article 4 a genuine general rule (points 1 and 2) — exceptions (points 3 to 5) relationship. Furthermore, it is not immediately apparent why several complementary rules should not be applied provided that they are concerned with different sets of unconnected circumstances which then also merit a different appraisal according to the situation.

When, however, the systematic interrelationship of which the Commission speaks is examined further and when the objective of the rules *as a whole*, which is to achieve effective restrictions of production, is born in mind, there is something to be said for the Commission's argument that care must be taken not to nullify the effect of the abatement provisions by granting too generous exemptions in special cases. This makes it plain that the idea of a cumulative application should at least be treated with scepticism. To justify such cumulation further weighty arguments would thus have to be adduced in its favour and it would have to be clearly shown that if cumulation were not permitted the consequences would be manifestly unreasonable.

(c) The applicant considers that a weighty argument of this kind may be derived from the fact that the various rules on adaptation contained in Article 4 are clearly intended to serve different *purposes* and envisage different sets of circumstances. In the case of points 3 and 5 the matters to be taken into account are those relating to the period prior to 1 July 1980, whereas the purpose of the rules under point 4 is to enable new production possibilities created after the expiry of the reference period to be taken into account. In the applicant's view the fact that a benefit is granted for achieving a particular objective is no ground for refusing to grant another benefit which serves a different purpose.

As against this, the Commission regards at least points 4 and 5 of Article 4 of Decision No 2794/80/ECSC as provisions having a common objective inasmuch as under both provisions it is intended to reward conduct which complies with the general objectives set for the steel industry. Thus under point 5 restructuring measures are taken into account where they result in a desired long-term reduction in capacity. This is demonstrated by the fact that a precondition for the application of point 5 is the realization of a profit for 1979. Similarly, under point 4 — correctly interpreted — not every increase in production capacity is to be taken into account. What matters is, as is indicated by the requirement that the Commission should not have issued an unfavourable opinion, that there should be positive restructuring measures and that, in

creating new plant, total capacity is not in principle increased, a requirement stipulated in a Council resolution of March 1981.

On this aspect I prefer to follow the point of view of the Commission. In reality it is difficult to deny that there is a very close material connection between the rules on adaptation set out at point 4 and those set out at point 5 of Article 4, even on the assumption — and the Commission has in fact emphasized this point in response to the applicant's argument that Article 4, point 4, is impossible to apply in practice — that an increase in capacity does not always have to be accompanied by the shutdown of plant, and that therefore the Commission will not always issue an unfavourable opinion if investment programmes do not also provide for closures. I am also impressed by the fact that the rules clearly indicate that variations in capacity registered in relation to the reference period are only to be taken into account once. Thus either point 5 is applied in which case the undertaking is placed in such a position as if its production possibilities had not been reduced, or point 4 applies in which case it may generally be assumed that old production capacities, reduced since 1974, have been replaced by new capacities. If both provisions were to be applied at the same time an undertaking would be treated as if capacity had not been reduced and at the same time put in the same position as if they had been reduced. It is indeed difficult to reconcile the one with the other. In particular, it should not be forgotten in this connection that for points 4 and 5 different reference periods are relevant, in the case of point 5 it is the year 1974 and for point 4 the years 1977 to 1980. As the Commission rightly points out the different reference periods militate against an interpretation to the effect that in the first place the higher production of 1974 may be taken as the basis for adapting the reference production figures and that these may then again be increased by means of a correction based on the years 1977 to 1980.

(d) We must however now consider what results from considerations relating to the compliance with the *prohibition of discrimination.*

(aa) The applicant considers that only its point of view accords with the principle of equality of treatment and that therefore, with a view to complying with the general principles of the Treaty which include the prohibition of discrimination, an interpretation is to be preferred which permits a cumulative application of the rules on adaptation. Only to apply one of the provisions would result in different situations being treated in the same way. Moreover, it is incontestable that the view taken by the Commission would result in unjustified privileges being accorded to undertakings which had not taken restructuring measures in 1974 and later had activated new plant within the meaning of Article 4, point 4. Starting from a high level of production Article 4, point 4, is then applied and this results in a much higher reference production than in the case of an undertaking which reduced its capacities after 1974.

The Commission has denied that this is so and has argued that its interpretation is preferable also from the point of view of non-discrimination.

(bb) As regards this dispute the following individual points must be made:

— First it must be stated, to the detriment of the applicant's case, that it is only possible to refer to the similar

treatment of different situations if certain theoretical values are assumed, for instance if the reduction in capacity of an undertaking after 1974 corresponds exactly to the proportion of capacity which is taken into account under Article 4, point 4, in respect of a newly-activated plant. That is not, however, necessarily so and particularly not in the applicant's case where in the Commission's opinion the application of Article 4, point 4, results in a higher bonus by way of increase in the reference production than the application of point 5. It may not therefore be said that the applicant is receiving the same treatment as an undertaking which, having reduced capacity to the same degree since 1974, has not activated any new plant. On the contrary, it is the increase in capacity which is given recognition. Moreover, on a quite general note, it should not be forgotten that there can be no discrimination if the different treatment can be objectively justified, particularly in the light of the objectives of the rules in question.

— As regards the other example given by the applicant, which is intended to demonstrate the unjustifiably improved situation of an undertaking which has new plant but which had taken no restructuring measures, the essential point is that, because the applicant supposes that the reference production is the same as that for 1974 and that it is further increased by the application of Article 4, point 4, this example is based on the assumption that that undertaking was able to maintain its production level in the years after 1974 in spite of the crisis in the steel industry. The Commission has rightly pointed out that if this supposition were correct the undertaking would have already been modernized and, if that were the case, no objection could be raised against its improved situation; on the contrary that situation would be justified because the undertaking would be, as it were, a "forerunner" so far as restructuring is concerned. Moreover, according to the Commission, it must also be said that the applicant's premise is false, because under normal circumstances it would simply not be conceivable for an undertaking to have maintained the volume of production achieved in 1974. Nor could this latter point be overcome by the applicant's argument that such cases might well be conceivable where old plant was utilized with the aid of subsidies. No evidence can be adduced in support of this argument and in particular it cannot be shown that these are *typical* cases which alone are suitable for comparison.

— On the other hand it must be recognized that it is possible to direct the Commission's arguments relating to non-discrimination against the notion of a cumulative application of the rules on adaptation. Thus it seems clear that Article 4, point 4 should be understood as meaning that undertakings which activate new plant should, in order to facilitate a sensible introduction of new capacity, be placed in such a position as if the plant had already been activated during the reference period ending on 30 June 1980. Since it does not seem sensible, in the context of the quota system, to give greater recognition to plant activated at a later date such undertakings must not be put in a better position than those which have likewise introduced restructuring measures but which have developed new production possibilities in such a way that these are taken into account in the reference period. But an undertaking would indeed be placed in an unjustifiably better position, as the examples given by the Commission show, if the applicant's view were accepted, a result which could only

be avoided if the rules on adaptation were applied in the alternative, as the Commission proposes.

Nor is it possible to uphold the objection, which the applicant has sougth to make, that the infelicitous wording of Decision No 2794/80/ECSC makes discrimination inevitable in any event. The applicant argues that if new plant had been activated before 1 July 1980 that plant can only have been taken into account in calculating the normal reference production if the activation had taken place a sufficiently long time before 1 July 1980; later activations would on the other hand have had only limited effect and those taking place on 30 June 1980, the day before the decisive date, would have had no effect at all. This admittedly unsatisfactory result can in fact be avoided, as the Commission has shown, by a sensible application of the provisions, in particular by regarding the activation of plant as occurring at the end of the running-in period and by proceeding on the basis of the requirement that, to be run in, the plant must have been operating for three months. Moreover, the Commission has also let it be known that it is perfectly willing to remedy any other remaining anomalies by means of Article 14 of Decision No 2794/80/ECSC which I mentioned at the outset.

(e) After all these considerations amongst which may be included the fear that a cumulative application of the rules on increases might possibly result in a reference production which exceeds the production capacity of an undertaking it may be said that there is more in favour of an alternative rather than a cumulative application of the rules on adaptation and that in any event there are no weighty and compelling considerations to be found in favour of the applicant's point of view. Therefore the Commission may certainly not be criticized for applying only point 4 but not point 5 of Article 4 of the decision when fixing the applicant's production quotas for the first quarter of 1981.

4. Objections concerning General Decision No 2794/80/ECSC

In this last section I must finally deal with the criticism directed at the basic provisions governing the introduction of the production quotas.

Two aspects must be kept separate here:

— First, the applicant doubts whether the precondition laid down in Article 4, point 4, of the decision (absence of an unfavourable opinion of the Commission on an investment programme) can be reconciled with the ECSC Treaty. The applicant bases its argument upon the fact that under the fourth paragraph of Article 54 of the ECSC Treaty opinions of this nature are not intended to be binding whereas in the context of the quota rules they do involve legal consequences.

— Secondly the applicant considers that the fixing of delivery quotas in Article 7 (2) of Decision No 2794/80/ECSC is not permissible and complains that this provision is in many respects unclear.

Basically the applicant takes the view in this connection that such objections of illegality are admissible as regards all the provisions of the general decision. It does not matter whether a provision which has been criticized has been applied in its case; nor is it necessary that

the applicant should be directly affected by an infringement of the Treaty of this nature. Every undertaking must be considered as affected if it is established that the quota rules offend against general principles, particularly the prohibition of discrimination.

My opinion on these matters is as follows:

(a) First it is not quite clear whether the first objection was at all maintained. Once the Commission had made clear that it did not intend to deliver an unfavourable opinion in the applicant's case the applicant stated in its second application that it did not wish to take this point further. This could be interpreted as meaning that the applicant had dropped that objection.

(b) As you know, the Commission has strongly disputed the *admissibility* of these objections in the present proceedings. Its main contention on this point is that criticism of a general decision is certainly admissible if the intention is to demonstrate the illegality of the decision as a whole and in this way to destroy the basis upon which individual decisions have been taken. But if it is only a question of levelling criticism at individual provisions of the general decision it must be required that such individual provisions should have been crystallized in an individual decision, that the individual decision should be based on the contested provision and that it should constitute an application of the general rule.

This view is in my opinion correct. I already made that clear in my opinion delivered in Case 92/78 *(Simmenthal SpA* v *Commission of the European Communities* [1979] ECR 777), cited by the applicant in these proceedings. That opinion contains not only the statement, mentioned by the applicant but formulated in connection with a different kind of problem, to the effect that the objection of illegality does not have to be supported by proof of any special interest, but also the obeservation that it is necessary that the contested decision should constitute a direct application of the contested general rule. This has also been repeatedly made clear in this case-law, for instance in the judgment of 13 July 1966 in Case 32/65 *(Government of the Italian Republic* v *Council and Commission of the EEC* [1966] ECR 389) which is concerned with a similar principle to be found in Article 184 of the EEC Treaty. It follows from that judgment that it is essential that a regulation the legality of which is called in question was applied to the issue with which the application is concerned. Accordingly the decisive question is whether a finding that such a regulation is inapplicable can have any bearing on the legality of the directly contested measure.

(c) Applying these considerations to the present case there can surely be no need to go into the reservations expressed on the subject of Article 4, point 4, of Decision No 2794/80/ECSC. The Commission's refusal to apply this provision to the applicant's case is not attributable to any unfavourable opinion delivered by the Commission but to the fact that other conditions laid down in that provision are not satisfied. If it were found that the requirement of "the absence of an unfavourable opinion of the Commission" is unlawful no other decision in the applicant's case would in

fact be possible, or, since Article 4, point 4, would have had to be applied to other undertakings which had been the subject of an unfavourable opinion, at most the result would be a reduction in the quotas fixed for the applicant, which is surely not what the applicant would wish.

(d) Similar considerations apply to the objections and observations concerning Article 7 (2).

Under that provision all undertakings are required to limit their deliveries within the common market in accordance with the ratio of Community deliveries to total deliveries during twelve different months of the period from July 1977 to June 1980. It is indeed undeniable that this provision is connected with the notification of quotas because the sum of the delivery quotas for the Community and for non-member countries is equivalent to the production quota, in other words the determination of the production quota means at the same time the determination of the delivery quotas. The essential point, however, is that the rules governing the delivery quotas which, as opposed to the case of the production quotas where an absolute figure is concerned, are based on a ratio which is different for every undertaking and which was already ascertained when the decision was issued, do not form the *basis* for the determination of the production quotas and therefore it cannot be said that they were *applied* in the contested notifications. Accordingly if Article 7 (2) were found to be illegal, this would not result in the notification of the production quotas being declared void. The reference to production quotas which is to be found in the case of the delivery quotas is therefore certainly not sufficient to justify making Article 7 (2) a subject for examination in proceedings concerned with the review of notifications of production quotas. At most that provision might become relevant if a fine were imposed for exceeding that part of the quota which may be delivered within the common market and if that fine were contested before the Court.

As a final observation is should also be made clear — and there the matter may rest — that applications for annulment such as the ones before the Court may certainly not be used to obtain a clarification *in vacuo* of the content of Article 7 (2). Such, however, has apparently been the aim of the applicant in the greater part of its argument relating to Article 7 (2).

III — I thus propose that the two applications brought by Krupp Stahl AG should be dismissed as unfounded and that the applicant be ordered to pay the costs.