2. Costs are reserved.

Luxembourg, 17 January 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 9 JANUARY 1980

My Lords,

The facts of this case and the arguments of the parties are in the forefront of Your Lordship's minds and I need not rehearse them.

The Commission in its written observations on the application for interim measures took two points as to the admissibility of the main application in so far as it is founded on Article 173 of the Treaty. There was some discussion this morning on the question whether those points could be relevant at this stage. In my opinion they must be, because, if Your Lordships were to take the view that the main application was clearly inadmissible, the present application must fail, or at all events it would be open to Your Lordships to reject it on that ground.

The first point was that the letter of 27 August 1979 signed by an official of the Commission and in which he said to the applicant's Solicitors:

"I regret that I cannot comply with your proposal to make an interim decision. There is no legal basis in Community law for such procedure."

was not, in form or in substance, a decision of the Commission. On that point the Commission cited the opinion of Mr Advocate General Mayras in Cases 109 and 114/75 *N.C.C.* v *Commission* [1977] 1 ECR 381, an opinion which, because of the subsequent discontinuance of the proceedings, was not followed by a judgment of the Court. It seems to me that, as was submitted on behalf of the applicant, that opinion, in which Mr Advocate General Mayras very thoroughly considered the relevant law, is a clear authority against the Commission's submission, because

Mr Advocate General Mayras held that the comparable letter there in question would have been, but for one circumstance, a decision of the Commission for the annulment of which the applicant could sue. That circumstance was that the letter merely confirmed an earlier implicit decision of the Commission. I would therefore reject the Commission's submission on that first point.

The Commission secondly suggested, though without pressing the point, that the main application might not have been made within the time limit required in Article 173. As to that, the letter of 27 August bears a stamp evincing that it was received by the applicant's solicitors on 4 September 1979. The two-months' time limit prescribed by Article 173 would accordingly normally have ended on 4 November 1979, but that day was a Sunday, so that, by virtue of Article 80 (2) of the Rules of Procedure of the Court, the last day for lodging the application was 5 November 1979, which was in fact the day on which it was lodged. The Commission's second point therefore, in my opinion, also fails.

Those conclusions make it strictly unnecessary to consider the admissibility of the application in so far as it is founded on Article 175 of the Treaty. I agree with Mr Advocate General Mayras, who pointed out in the *N.C.C.* case that a person who is aggrieved by a refusal by the Commission to take particular action must be entitled *either* to bring proceedings against the Commission for annulment of its decision not to take that action (under Article 33 of the ECSC Treaty or Article 173 of the EEC Treaty) *or* to bring proceedings against the Commission for its failure to act (under Article 35 of the ECSC Treaty or Article 175 of the EEC Treaty). He cannot be denied both remedies. But I also agree with the Commission that he cannot be entitled to both remedies. The most he can do is to rely on them in the alternative, which is what the applicant here has done.

So I turn to the substance of the case and in particular to the central question, which is whether the Commission has power, in the course of administrative proceedings under Article 3 of Regulation No 17, to order interim measures.

If the answer to that question is "No" the present application for interim relief must in my opinion necessarily fail, because it must then follow, on the one hand that the Court cannot, in response to the applicant's primary claim, require the Commission to order interim measures, and, on the other hand, that the Court cannot order such measures itself. It cannot order them itself if only because, as the Commission reminded us in its written observations, an applicant before the Court cannot succeed on a claim for interim relief unless he shows that he has, the Commission said "a *prima facie* case", I would say at least an arguable case, in the main proceedings. Here, if the Commission has, as a matter of law, no power to order interim measures in proceedings under Article 3 of Regulation No 17, the main application is unquestionably ill-founded.

That no such power is conferred on the Commission expressly is in my opinion

manifest. What the Commission suggests is that it should be regarded as having an "inherent or implied power" to do so. The applicant submits that it has such an implied power.

I can dispose very shortly of the suggestion that the Commission may have an "inherent" power to that effect. A body that is created by a legal instrument does not have "inherent" powers. It has only the powers that are conferred on it by that instrument, or by virtue of it, either expressly or by necessary implication. It differs in that respect from, for instance, a natural person or an entity that exists independently of any instrument, such as a sovereign State.

So the question is whether the power in question is conferred on the Commission by necessary implication, either by the EEC Treaty or by legislation adopted thereunder, which means in effect Regulation No 17.

To imply such a power in the EEC Treaty would in my opinion be inconsistent with the terms of that Treaty. Article 87 clearly envisages that such a power can only be conferred on the Commission by an act of the Council. The transitional provisions in Articles 88 and 89 envisaged that, until the Council had adopted under Article 87 what that Article called "appropriate regulations and directives to give effect to the principles set out in Articles 85 and 86", the authorities in Member States should shoulder the main burden of giving effect to those principles. The Commission's powers were limited to proposing "appropriate measures" to those authorities and, in the ultimate resort, to recording an infringement of those principles in a reasoned decision and authorizing Member States to take specified measures "to remedy the situation". I do not think one can divorce the first sentence of Article 89 from the rest of that Article in the manner that was suggested to us this morning. Nor do I think that one can interpret the general terms of Article 155 as overriding the specific provisions of Articles 87 to 89.

We were referred to the decisions of President Lecourt in the *Miles Druce* case [1973] 2 ECR 1049 and [1974] 1 ECR 281 and to his decision on the application for interim measures in the *N.C.C.* case [1975] 2 ECR 1193.

In my opinion those decisions are distinguishable.

Firstly, not only the terms but the very structure of the provisions of the ECSC Treaty that were there relied upon, particularly Articles 60 and 66, are quite different from the terms and structure of the provisions of the EEC Treaty that are here in question. In particular those provisions of the ECSC Treaty do not envisage that the relevant powers of the Commission should be defined by the Council. They are defined, and in elastic terms, by the Treaty itself.

Moreover, in the *Miles Druce* case, the provision specifically relied upon by the applicant and referred to by President Lecourt in the first of his orders was the

third sub-paragraph of Article 66 (5) of the ECSC Treaty, which expressly empowers the Commission to "take or cause to be taken such interim measures of protection as it may consider necessary, etc.".

In the *N.C.C.* case, N.C.C.'s main application in effect challenged a decision of the Commission that the National Coal Board had not infringed the ECSC Treaty. It was as if, here, the Commission's decision under challenge were a decision that the Hasselblad companies had not infringed the EEC Treaty. In such a situation it might well be held that the Court itself had jurisdiction to order interim measures and that that jurisdiction (which is conferred on the Court in very wide terms) extended to requiring the Commission to prescribe them, on the grounds mentioned by President Lecourt in his order, such as the proper division of functions between the Court and the Commission, and the Commission's better knowledge of the detailed facts of the case. But here that approach is impossible, since the only decision of the Commission under challenge is as to the Commission's own interim powers.

There remains Regulation No 17. Article 3 of that instrument is in these terms:

"1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

3. Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph 1, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement."

That seems to me to establish a clear distinction between what the Commission may do once it has made a finding of infringement and what it may do before it has reached that stage. Article 3 is inconsistent with the Commission having power, before it has issued a decision based on a finding of infringement, to go further than to address recommendations to the undertakings concerned. As we were reminded this morning a decision under paragraph 1 of Article 3 can only be adopted after certain prescribed steps have been taken. In particular a statement of objections must have been sent to the undertaking or undertakings concerned, they must have been heard in answer to it, and the Advisory Committee must have been consulted. No such formalities are required before a recommendation can be made under paragraph 3. The crux, however, in my opinion, is that, under Article 3, no decision binding on the undertaking or undertakings concerned can be adopted before there is a finding of infringement.

Other copious and detailed interim powers are conferred on the Commission by Articles 11 to 14 of the Regulation, and they are backed up by the provisions about fines and penalties contained in Articles 15 and 16. None of those Articles come anywhere near implying that the Commission has power to order interim measures of the kind here in question.

I conclude that, not only does Regulation No 17 not confer such a power on the Commission by necessary implication, but that, indeed, the necessary implication from the terms of that Regulation is that its authors had no intention of conferring such a power on the Commission.

Whether they were right or wrong is not the question. Arguments were addressed to us on behalf of the applicant and of the Commission, some of them attractive, to show that it was desirable that the Commission should have such a power. In my opinion those arguments should be addressed to the Council, not to this Court. This Court exists to say what the law is, not what it ought to be.

In the result I am of the opinion that this application should be dismissed and that the applicant should be ordered to pay the Hasselblad companies' costs. The Commission has not asked for costs.