OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 10 February 1987 *

Mr President,
Members of the Court,

The Associazione industrie siderurgiche italiane ('Assider') and the Government of the Italian Republic have instituted proceedings against the Commission for failure to act. They seek a declaration that the Commission's implied decisions refusing their formal requests of 18 February and 2 April 1985 are void, and the application *in toto* of the measures provided for in Article 15B of Commission Decision No 234/84/ECSC of 31 January 1984 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry. [1]

In the alternative, Assider seeks the annulment of the express decision of refusal which may be contained in the Commission's letter of 22 March 1985 sent to the Italian Minister for Industry, which was transmitted to Assider on 24 April 1985.

The relevant legislation and details of the facts, submissions and arguments of the parties are set out in the Report for the Hearing. I will therefore refer to them only where strictly necessary. Before considering the substance of the case, I wish to comment briefly on the admissibility of the two applications.

A — Admissibility

The Commission raises an objection of inadmissibility to Assider's alternative claim on the ground that the letters of 22 March and 24 April 1985 are not in the nature of an express decision refusing to apply the procedure under Article 15B but merely indicate the nature of the measures already adopted and state that the investigation will be pursued with a view to taking any further action which may be necessary.

However, the question whether or not an express decision was adopted within the two-month period prescribed by the third paragraph of Article 35 of the ECSC Treaty must be considered by the Court of its own motion. [2] Hence it is also necessary to determine whether or not the letter of 2 May 1985 sent to the Italian Government by way of reply to the latter's formal request of 2 April 1985 is in the nature of an express decision. If it is, it means that the Commission broke its silence and only an action for annulment under Article 33 would be open to the applicants.

In the circumstances, the letter of 24 April 1985 (to which the letter of 22 March 1985 was annexed) and the letter of 2 May 1985 cannot be regarded as having broken the Commission's silence.

It follows from the case-law of the Court that there is no express decision, even an adverse one, capable of interrupting a failure to act where the institution merely informed the person concerned that the questions raised by the latter were being studied [3] and that it had begun the necessary

* Translated from the French.

1 — OJ 1984, L 29, p. 1.

2 — See the judgment of 17 July 1959 in Case 42/58 *Société des aciers fins de l'Est (SAFE)* v *High Authority* [1959] ECR 183 at p. 191.

3 — Judgment of 17 July 1959 in Case 42/58 *Société des aciers fins de l'Est (SAFE)* v *High Authority* [1959] ECR 183 at p. 191; see also the judgment of 22 March 1961 in Joined Cases 42 and 49/59 *Snupat* v *High Authority* [1961] ECR 53 at p. 73.

preliminary work,[4] or where the institution merely repeated and explained its previous legal position.[5]

That was in fact the case here.

In its letter of 24 April 1985 the Commission, whilst referring in the attached letter of 22 May 1985 to the action already taken, merely undertakes to 'keep (Assider) informed should the detailed investigations in progress reveal factors of such a kind as to justify further action by the Commission under the procedure provided for in Article 15B of Decision No 234/84/ECSC'.

In its letter of 2 May 1985 the Commission explains that 'all the action [taken so far] is consistent with the undertakings given by the Commission to the Court of Justice' in Case 45/84 R[6] and it suggests the establishment of an appropriate procedure for the reciprocal transmission of information to enable it to study in depth the data available.

The letters of 24 April and 2 May 1985 are not therefore in the nature of express decisions refusing to adopt the measures required. Assider's alternative claim for the annulment of the decision which may be contained in the letter of 24 April 1985 is therefore inadmissible as it is devoid of purpose.

4 — Judgment of 22 March 1961 in Joined Cases 42 and 49/59 *Snupat* v *High Authority* [1961] ECR 53 at p. 74.

5 — Judgment of 6 April 1982 in Joined Cases 21 to 26/61 *Meroni* v *High Authority* [1962] ECR 73 at p. 76.

6 — See the Order of 28 March 1984 in Case 45/84 R *European Independent Steelwork Association* v *Commission* [1984] ECR 1759.

B — Substance

Assider and the Italian Government contend that the Commission has failed to act inasmuch as it wrongly refused to adopt the measures which Article 15B (4) of Decision No 234/84/ECSC requires it to adopt *once* the conditions described therein are satisfied. In the alternative, should the Commission *have a discretion* in the matter, the applicants contend that it was guilty of a misuse of powers by ascribing to paragraphs 4 and 5 of Article 15B a purpose other than their true purpose.

The Commission, however, rejects any strictly literal interpretation of the provisions in question and regards them as having only a *subsidiary character.* In its view, it is entitled to apply the measures provided for in those provisions only with the greatest care and under very strict conditions, that is to say only after first establishing that the imbalance in traditional deliveries is attributable to the pursuit by undertakings of practices that are contrary to Community law and that the penalties imposed as the result of any infringements concerning prices, quotas, competition and State aids have proved ineffectual. Any interpretation leading to the virtually automatic application of the measures provided for in Article 15B as soon as a serious disturbance in trade between Member States is established would be incompatible with the ECSC Treaty itself. It follows, according to the Commission, that there was (and still is) no failure to act on its part, because, in view of the circumstances of the case, it was not required and was not even entitled to adopt the measures sought by the applicants.

Accordingly, whether these applications are to be upheld or dismissed ultimately depends on the interpretation of Article 15B of Decision No 234/84/ECSC and, in particular, the conditions for its application.

Since the interpretation of any legal provision depends *inter alia* on the purpose it pursues, I wish to begin by considering the aim of Article 15B, particularly since the parties to the proceedings attach so much importance to this question.

1. *The aim of Article 15B*

Article 15B was incorporated by Decision No 234/84/ECSC in the Community legislation that had been force since the beginning of the 1980s in order to combat the manifest crisis in the steel industry. Hence it forms part of the system of monitoring and production quotas that was extended by that decision and, in addition, of the other measures adopted in connection with the steel crisis and the restructuring of the Community's iron and steel industry.

The link between all those measures is self-evident. It finds expression in the various decisions themselves[7] and has on several occasions been confirmed by the Court in its judgments.[8] Furthermore, the minutes of the meeting of the Council of Ministers responsible for the iron and steel industry, which was held on 22 December 1983 and preceded the adoption or extension of those various measures, are quite explicit in that regard.

In point 4 (Steel policy — Short-term measures), paragraph 4 (checks on cross-border movements of steel products in the Community) of the minutes of that meeting, the Council 'confirms that the restructuring of the steel sector rests on a principle of solidarity as expressed in the regulations of the quota system and the provisions of the aids code. This solidarity ensures a market situation compatible with the restructuring of undertakings where that is necessary, and allows each undertaking to achieve its agreed level of activity. The maintenance of the traditional flows of trade is in line with this principle, and without this there would be the possibility of a diversion of trade by some undertakings at the expense of others'.

Those views were restated in the ninth recital in the preamble to Decision No 234/84/ECSC which states that 'the stability of traditional patterns of deliveries of steel products within the Community is an essential factor which must be preserved if the restructuring of the steel industry is to be carried out within a competitive context compatible with the solidarity imposed by the production quota system'.

Accordingly, the maintenance of traditional patterns is not an end in itself but constitutes a means of combating the crisis. It must help ensure that the iron and steel sector is restructured in a competitive context which is compatible with the fundamental principle of solidarity between

7 — See for instance the penultimate paragraph of the first recital in the preamble to Commission Decision No 234/84/ECSC; see also the sixth recital in the preamble to Commission Decision No 3715/83/ECSC of 23 December 1983 fixing minimum prices for certain steel products (OJ 1983, L 373, p. 1): 'such a measure is an integral part of the other crisis measures taken by the Commission, in particular with regard to quantities. It should therefore be temporary.'

8 — See, for instance, the Court's judgment of 15 October 1985 in Joined Cases 211 and 212/83 and 77 and 78/84 *Krupp and Thyssen* v *Commission* [1985] ECR 3409, paragraph 25 of the decision: '... the Commission is quite correct, in view of the seriousness of the crisis in the steel industry and of the measures needed to overcome it, to regulate the process of restructuring by a series of measures of which the quota system forms part', and paragraph 34 of the decision: '... despite the differences in their legal basis and the criteria for their application, the objective of both [the quota and aid] systems is restructuring'.

different undertakings, which constitutes the basis of any anti-crisis policy.[9] The second paragraph of the ninth recital in the preamble to Decision No 234/84/ECSC expressly states that the aim of Article 15B is to 'ensure that this principle is complied with'.

To that end, Article 15B makes two specific means of action available to the Commission:

first, the Commission may formally request the undertakings in question to give a commitment that, during the following quarter, they will themselves correct the imbalance in their traditional deliveries (paragraph 4);

secondly, if no such commitment is given or if the commitment is not honoured by an undertaking, the Commission may reduce the quotas which the undertaking may deliver in the common market for the following quarter by a quantity not exceeding that which caused the imbalance in traditional deliveries (paragraph 5);

The measure provided for in paragraph 4 is not in the nature of a penalty. It follows from paragraph 5 that a refusal to comply with the Commission's request or failure to honour a commitment does not automatically entail a reduction in the quota referred to in that paragraph. It may therefore be regarded as a straightforward appeal to the good will of undertakings urging them to refrain, in a spirit of solidarity, from strengthening their own positions at the expense of their comparatively weaker competitors, which, in a period of widespread crisis, might ultimately prove fatal to the iron and steel industry as a whole. Hence I do not consider that the application of paragraph 4 must necessarily depend on a prior finding of unlawful conduct on the part of the undertaking to which such a request is made.

On the other hand, the quota reduction provided for in paragraph 5 clearly constitutes a penalty, the imposition of which depends largely on the Commission's discretion. Its application presupposes, like any other penalty, the existence of an infringement. In my view, such an infringement cannot consist simply in a sharp increase in traditional deliveries. For such an increase to be penalized, it must be attributable to, and a consequence of, unlawful conduct.

In its order of 28 March 1984 in Case 37/84 R,[10] involving an application for the suspension of the operation of Decision No 3717/83/ECSC[11] which has as its purpose the collection of the statistical data needed to monitor trends in intra-Community trade, the Court restated as follows the Commission's explanation concerning the risks inherent in having certain undertakings change their traditional market shares in disregard of the aids code and of the rules on pricing under the protection of the quota system:

'Although the aggregate deliveries of undertakings are limited by the production quota system, undertakings still have some freedom of action, which could induce some of them to acquire new customers on strong markets, at more remunerative prices, but at the cost of considerable distortion. Market trends vary within the Community, and for

9 — See, in particular, the judgment of 18 March 1980 in Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39 and 31/83 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 59 of the decision; and the judgment of 12 July 1984 in Case 81/83 *Busseni* v *Commission* [1984] ECR 2951, paragraph 18 of the decision.

10 — *Case 37/84 R, European Independent Steelwork Association* v *Commission* [1984] ECR 1749 at pp. 1752 and 1753.

11 — Commission Decision No 3717/83/ECSC of 23 December 1983 introducing for steel undertakings and steel dealers a production certificate and an accompanying document for deliveries of certain products (OJ 1983, L 373, p. 9).

that reason steel prices may vary considerably from one region to another. In those circumstances producers may be tempted to win new markets, if necessary by disregarding the rules on pricing. In the Commission's view the behaviour of undertakings which disturb other markets under the cloak of the Article 58 system and of a favourable system of aid, to the detriment of other undertakings, cannot be considered normal.'

Furthermore, Decision No 234/84/ECSC itself contains other provisions which demonstrate that it is quite legitimate to take account, in one of the areas covered by the anti-crisis policy, of infringements committed in other areas covered by the same policy.

Article 14C thus makes the allocation of additional quotas dependent on the undertakings concerned not having been penalized under the rules on pricing (or having paid the fines imposed).

Similarly, Article 15A provides that the Commission may reduce an undertaking's quotas if the undertaking has received unauthorized aids or if the conditions under which the aids were authorized have not been complied with.

In its judgments of 11 May 1983 in the *Klöckner-Werke* cases,[12] the Court expressly 'acknowledged that the Commission was entitled, in laying down the system of production quotas, to take account of the effect of subsidies the illegality of which has been established in conformity with the appropriate procedures'.

In its judgment of 15 October 1985 in *Krupp and Thyssen* v *Commission*,[13] the Court pointed out that 'it is therefore neither arbitrary nor discriminatory if factors resulting from the application of one of the systems [of quotas and aids] are used as a point of reference in the other' (paragraph 34 of the decision).

In those circumstances, a measure reducing the quotas which may be delivered in the common market by undertakings whose unlawful practices have caused disturbances in traditional patterns is not in my view less acceptable or more incompatible with the fundamental principles of the common market in iron and steel products than the approach taken by the Court in the aforesaid *Klöckner-Werke* judgments.

In the first place, Article 3 (g) of the ECSC Treaty does not prohibit 'protection against competing industries' but only protection 'that is not justified by improper action on their part or in their favour'.

Secondly, the third indent of Article 5 of the ECSC Treaty expressly allows direct influence to be exerted upon production or upon the market 'when circumstances so require'.

Finally, there is no need to emphasize the links between those different principles, and more particularly between freedom of movement and competition which has not been distorted by illegal practices concerning prices, or by agreements,

12 — Case 244/81 [1983] ECR 1451, paragraph 37 of the decision; Joined Cases 311/81 and 30/82 [1983] ECR 1549, paragraph 36 of the decision; and Case 136/82 [1983] ECR 1599, paragraph 36 of the decision.

13 — Joined Cases 211 and 212/83 and 77 and 78/84 *Krupp Stahl AG and Thyssen Stahl AG* v *Commission* [1985] ECR 3409.

decisions or concerted practices between undertakings or by the grant of State aids.

In these cases, as in Case 45/84 R, the Commission explained that, in the absence of Article 15B, 'Member States would be inclined either to take national compensatory measures, which would lead to the disintegration of the common market, or to request the implementation of the safeguard clause contained in Article 37 of the ECSC Treaty, with unforeseeable results which could cause much more harm to the common market than the limited measures provided for in Article 15B' (*Independent Steelworks Association* v *Commission* [1984] ECR 1759 at p. 1762).

According to the Commission and the Council, only measures such as those provided for in Article 15B were capable of ensuring, if only within certain limits, the normal functioning of the common market in conformity as far as possible with the objectives and principles laid down in Articles 2, 3 and 4 of the Treaty.

In that regard, I would recall that, in its judgment of 21 June 1958,[14] the Court acknowledged that 'in practice it will always be necessary to reconcile to a certain degree the various objectives of Article 3 since it is clearly impossible to attain them all fully and simultaneously as those objectives constitute general principles which must be observed and harmonized as far as possible'. From that, the Court inferred, in its judgment of 18 March 1980,[15] that 'if the need for a compromise between the various objectives [of Article 3] is imperative in a normal market situation, it must be accepted *a fortiori* in a state of crisis justifying the adoption of exceptional measures which derogate from the normal rules governing the working of the common market in steel and which clearly entail non-compliance with certain objectives laid down by Article 3 . . .'. That strikes me as being equally applicable to the objectives of Articles 2 and 4, in relation to which the Court also acknowledged that it is not certain whether they can be simultaneously pursued in their entirety and in all circumstances,[16] particularly if it is borne in mind that the principles embodied in Article 4 may, albeit 'as provided in this Treaty', be subject to certain limitations.[17]

The letters sent by the Commission in April 1984 to iron and steel undertakings in the Community in order to elucidate the detailed rules for interpreting and applying Article 15B also revealed its awareness of the need to reconcile those different over-riding requirements inasmuch as it stated that 'the Treaty requires it to take all the necessary steps to safeguard the advantage consisting in the free movement of iron and steel products for the benefit of both producers and users[18] but . . . that the ECSC Treaty requires it at the same time to ensure the maintenance and observance of normal competitive conditions (third indent of Article 5)'.

Accordingly, the measure provided for in Article 15B (5) was considered, in the absence of voluntary restraint by the undertakings concerned, as the means most suited to re-establishing traditional patterns of

14 — Case 8/57 *Groupement des hauts-fourneaux et aciéries belges* v *High Authority* [1957-58] ECR 245 at p. 253.

15 — *Valsabbia and Others* v *Commission* [1980] ECR 907, paragraphs 53 to 55 of the decision.

16 — See the Court's judgment of 16 February 1982 in Case 276/80 *Padana* v *Commission* [1982] ECR 517, paragraph 21 of the decision.

17 — See in that connection the Court's judgment of 28 June 1984 in Case 36/83 *Mabanaft* v *Hauptzollamt Emmerich* [1984] ECR 2497, paragraphs 23 and 24 of the decision.

18 — This seems to be a reference to Article 4 (b) of the ECSC Treaty.

trade — disturbed as a result of unlawful conduct — in conformity as far as possible, in view of the crisis in the steel industry, with all the principles and objectives of the ECSC Treaty.

As the Commission rightly emphasizes in its reply to a question from a Member of the European Parliament,[19] the effect of Article 15B 'is not to divide the Community but on the contrary simply to provide an extra means of ensuring the unity of the Community market by supporting the stability of the market and the solidarity of the industry during the crucial period when a major restructuring of the industry is taking place'.

Since that is the aim of Article 15B, the question is whether, in this case, the conditions for the application of that provision were satisfied and whether the Commission was therefore wrong to refrain from adopting the measures prescribed by that provision.

2. *Whether the conditions for the application of the measures provided for in Article 15B (4) were satisfied in this case*

Italy made successive complaints on 5 June, 5 August and 30 November 1984 and on 25 February 1985 relating to the different quarters of 1984. A complaint relating to the whole of 1984 was repeated on 11 March 1985.

These applications are concerned only with 1984, the year to which the formal requests made by the applicants related, even though, according to the Italian Government, the disturbances continued in the first two quarters of 1985.

19 — Written Question No 813/84, OJ C 71 of 18.3.1985, p. 5.

It is apparent from a series of letters and documents included in the file by the applicants that the Commission acknowledged that there were 'substantial variations' in deliveries to Italy of products in categories Ia, II and Ib in the quarters of 1984 (letter of 20 March 1985) and that the 'imbalance in traditional patterns' for those products, which had been referred to by Italy, was borne out by its own calculations (letter of 2 May 1985). In its defence (last paragraph of section 5) it expressly acknowledges that 'scrutiny of all the data gathered so far has confirmed in substance that in 1984 appreciable changes occurred in the usual volume of deliveries on the Italian market to the advantage of products from France and the Benelux countries'.

The figures annexed to the Italian Minister for Industry's letter of 11 March 1985 confirm quite clearly that those changes were 'substantial' also having regard to the criteria used by the Commission in its calculations, which were explained by the latter in its replies to questions from the Court. According to those criteria, the conditions for initiating the procedure provided for in Article 15B are satisfied where a Member State's share of another Member State's market in a given category of products varies by more than 1%.

Hence the Commission actually started to implement the system established by Article 15B even before the applicants submitted their formal requests to it.

Thus, first of all, in October 1984 it arranged bilateral consultations between the Member States concerned for the purpose of comparing statistical data from both sides and obtaining details and figures for each undertaking so as to enable it to determine

in earnest whether Italy's complaints were justified.

Finding that the imbalance concerning the products in categories Ia and II was the result of an increase in deliveries of semi-finished products intended for the manufacture of small welded tubes, the Commission attempted once again, at a meeting held in December 1984, to persuade the manufacturers to enter into an arrangement involving voluntary restraint based on a new method of applying Article 10 (1) of Decision No 234/84/ECSC, which regulates the allocation of additional quotas for the category in question.

In that regard, I would point out that at the hearing the Commission acknowledged that that initiative must not be seen as a request to exercise voluntary restraint pursuant to Article 15B (4). Moreover, it added that the undertakings concerned expressly refused to establish any connection between the two problems.

Finally, the Commission investigated prices at the undertakings concerned by deliveries to Italy of the same semi-finished products and, in the spring of 1985, it initiated against some 15 undertakings the procedure provided for in Article 36 of the ECSC Treaty, as a result of which in the autumn of 1985 the penalties laid down for infringing Article 60 of the ECSC Treaty were imposed on six of them. The fines were paid in December 1985.

With regard to the products in category Ib, the Commission claims that it is still waiting for a reply to its requests for additional information in order to enable it to determine in each case the origin of goods and, first and foremost, in order to carry out the necessary checks on the prices charged by the undertakings concerned. I would point out, however, that those requests were made on 2 and 8 May 1985.

Having regard to all the steps thus undertaken, the crucial question is whether they were sufficient or whether the Commission should also have adopted the measures specifically provided for in paragraph 4 or even paragraph 5 of Article 15B, in accordance with the applicants' demands.

In that regard, it should be noted that the procedure under Article 15B consists of three successive stages, namely the submission of a complaint by a Member State, the investigation of the complaint by the Commission to determine whether it is justified, followed where necessary by the adoption of the measures provided for.

Admittedly, it might be tempting to take the view that the Commission recognizes by implication that a complaint by a Member State is justified once it adopts that State's findings to the effect that traditional deliveries have been altered to a significant extent (paragraph 1).

However, the fact remains that, in examining whether such a complaint is justified, the Commission must take account not only of the statistical data transmitted in support of the complaint but also of 'all the circumstances pertaining to the case in question' (paragraph 3).

Accordingly, recognition that the figures on which a complaint is based are correct does not necessarily entail recognition that the complaint is justified within the meaning of Article 15B.

In its assessment the Commission may take into account other factors which may be such as to modify the significance of the figures and to defer or even render unnecessary or inappropriate the adoption of the measures provided for in paragraphs 4 and 5 of Article 15B.

Those factors may be of different kinds. In this case, in its letters of 21 December 1984 and 20 March 1985 the Commission asked the Italian Government to let it have its observations in cases where it had been established that Italy had substantially exceeded its traditional deliveries to the other Member States. It was probably on the basis of those figures and those observations that the Commission took the view, in its letter of 22 March 1985, that 'for all categories taken together (excluding that of semi-finished products for small welded tubes) the excess deliveries sometimes cancel each other out and correspond to normal market fluctuations'.

The investigations carried out may also relate to the causes which gave rise to the variations established and may lead to the finding of infringements in other areas, such as pricing, as was the case here.

Therefore the Commission undoubtedly enjoys a wide discretion in investigating the complaints submitted to it in order to ascertain whether they are justified.

Accordingly, it might be tempting to argue that in the present circumstances the Commission, which is still investigating Italy's complaints so as to determine whether they are justified, has not yet decided, even by implication, not to apply the measures provided for in paragraphs 4 and 5 of Article 15B, and consequently that it is not failing to act.

However, the investigation of complaints must necessarily be subject to certain limits, particularly temporal limits. It cannot be extended by the Commission at will but should logically lead either to the complaint being upheld, and to the adoption of the measures resulting from such a decision, or to its express rejection. In the latter case, the complainant and all those affected by a decision rejecting its complaint would be afforded sufficient legal protection in an action for annulment under Article 33 of the ECSC Treaty.

In the circumstances, even though it is true that in its letters of 21 December 1984, 20 and 22 March 1985 and 2 May 1985 the Commission always stated its views on the figures alone without ever expressly recognizing that Italy's complaints were justified, the fact remains that at no time in the proceedings before the Court did it challenge the applicants' contentions to the effect that it had acknowledged those complaints to be justified.

In my view, it is indisputable that, once the Commission established not only that deliveries had been altered to a significant extent but also that this was the result of infringements of the rules on prices, it should necessarily have recognized that the complaints were justified. It can even be argued that, in making those findings, the Commission recognized at least by implication that those complaints were justified.

It also seems possible to infer such implied recognition from the fact that in October 1984 the Commission arranged consultations with the Member States concerned. Article 15B (4) provides that the Commission 'shall consult the Member States concerned if it considers that the complaint is justified'.

In any event, as from that time the conditions for the application of Article 15B (4) were satisfied and any delay or evasion of the issue was inexcusable. Article 15B (4) provides that, if it considers a complaint submitted by a Member State to

be justified, the Commission '*shall* request the undertakings in question to give a commitment in writing that, during the following quarter, they will correct the imbalance in their traditional deliveries'.

There is therefore not the slightest doubt that the Commission was under an obligation to take such action. In the first place, the use of the word 'shall' normally expresses an obligation. Secondly, the binding nature of paragraph 4 is borne out by a comparison with paragraph 5 which goes on to provide that 'if an undertaking does not give such a commitment, or if the commitment is not honoured, the Commission may reduce the part of the undertaking's quota which may be delivered in the common market for the following quarter by a quantity not exceeding that which caused the imbalance in traditional deliveries.' Finally, the aim of Article 15B, as described above, required the Commission to take action.

The action provided for in paragraph 4 should have been taken even *before the Commission had definitively established the existence of any infringements* since, as I stated earlier, the measure provided for in paragraph 4 is not in the nature of a penalty. In any event, a significant alteration in traditional deliveries in a market characterized by the existence of production and delivery quotas very often constitutes evidence of such infringements and must in any event be urgently and swiftly investigated. However, it was unnecessary to await the result of those investigations.

A fortiori, before taking action under paragraph 4, the Commission was under no obligation to await the outcome of the 'classic' penalties which it was entitled to impose in appropriate circumstances. In that regard, moreover, a further argument, based on the wording and context of Article 15B, may be advanced. That provision exhibits the characteristics of a procedure to be applied in urgent cases. Requests made pursuant to such provisions must clearly be examined with particular promptness.

Admittedly, in this instance the examination need not be conducted as rapidly as when Article 37 of the ECSC Treaty is applied.

For example, when on 24 June 1968 the French Republic made a request to the Commission pursuant to that provision, that Member State was authorized to adopt measures for curtailing deliveries of iron and steel products originating in other Community countries and bound for France by a decision adopted only 12 days later.[20]

On 8 February 1974 the United Kingdom made a request to the Commission, whereupon the latter authorized that Member State as from 18 February 1974 to restrict its exports of ECSC products.[21] A further request made on 18 June 1974 was acceded to on 25 June 1974.[22]

Is there any urgency in this case?

Article 15B (2) provides that a complaint by a Member State must be submitted not later than eight weeks following the end of the quarter in which the traditional deliveries were altered to a significant extent.

According to Article 15B (4), the request addressed to the undertakings in question

20 — Commission Decision No 915/68/ECSC of 6 July 1968 on the application to the French Republic of Article 37 of the Treaty establishing the European Coal and Steel Community (JO 1968, L 159, p. 6).

21 — Commission Decision No 74/134/ECSC of 18 February 1974 on the application to the United Kingdom of Great Britain and Northern Ireland of Article 37 of the Treaty establishing the European Coal and Steel Community (OJ 1974, L 74, p. 20).

22 — Commission Decision of 25 June 1974 amending Commission Decision No 74/134/ECSC of 18 February 1974 on the application to the United Kingdom of Article 37 of the ECSC Treaty (OJ L 189 of 12.7.1974, p. 25).

must result in the imbalance being corrected 'during the following quarter'.

It is no doubt legitimate to take the view that the 'following quarter' is that following the quarter in which the complaint was submitted, and not that following the quarter in which the excess was established, since the Commission must be allowed a period of time in which to check the figures and assess the circumstances of the case.

Accordingly, the existence of excess deliveries in the first quarter of 1984 should have led the Commission to request the undertakings in question to give a commitment in writing that they would correct the imbalance in their traditional deliveries as from the third quarter of the same year.

It is therefore impossible to accept the Commission's argument to the effect that, before requesting the undertakings in question to give a commitment in writing pursuant to paragraph 4, it must first impose the 'classic' penalties in respect of the irregularities established (for instance, a fine for non-observance of minimum prices) and await the effects of those penalties.

That argument is incompatible with the rule that an imbalance must be corrected 'during the following quarter'.

The Commission has therefore failed to fulfil an obligation imposed upon it by Article 15B (4). By failing to comply with that obligation, it *has infringed a rule of law relating to the application of the ECSC Treaty.* I therefore suggest that the Court declare, on the basis of the first paragraph of Article 35 of the ECSC Treaty, that the Commission has failed to act.

As the applicants' first submission alleging an infringement of Article 15B (4) of Decision No 234/84/ECSC must therefore be accepted, I propose to consider the submission alleging a misuse of powers only in the alternative.

3. *Whether the Commission's failure to adopt the measures provided for in Article 15B (5) constituted a misuse of powers*

Logically, the question of the application of Article 15B (5) should not arise.

It is clear from the wording of paragraph 5 that the Commission may adopt the measures provided for therein only if an undertaking does not commit itself to voluntary restraint or does not honour its commitment. The application of paragraph 4 is therefore one of the conditions for the application of paragraph 5. We have seen that it was not in fact applied in this instance.

At the hearing, however, the Commission stated that it had considered it pointless to request the undertakings in question to give a commitment in writing to 'correct' their exports to Italy since it had been informed that those undertakings were not prepared to give one.

If the Court were to consider that (contrary to my view) in those circumstances the Commission was not obliged formally to request such a commitment, or that the informal response of the undertakings concerned was tantamount to 'not giving such a commitment', the question arises whether the Commission was guilty of a misuse of powers in not reducing the quotas of the undertakings in question pursuant to Article 15B (5).

Assider and the Italian Government take the view that merely to impose penalties, in this case, in respect of the prices charged amounts to failure to recognize the purpose of Article 15B.

They can consider that the measures provided for in that article constitute autonomous measures which must, where appropriate, be applied in conjunction with one another but in any event independently of the other penalties prescribed by the Community rules, and that those are the only measures enabling the specific purpose of that provision to be achieved.

In practice, therefore, it is necessary to ascertain whether, in relation to the purpose of Article 15B, the measures adopted by the Commission were sufficient and appropriate, or whether the Commission's failure to adopt the measures expressly provided for in paragraph 5 of that article constitutes a misuse of the powers which that provision confers on the Commission precisely in order to achieve that purpose.

The Court has consistently held that 'a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent facts, to have been taken for purposes other than those stated'.[23] The mere fact that the Commission, or another Community institution, exercises its powers for a purpose other than that for which they were conferred upon it constitutes a misuse of powers. The same holds true *if the institution refuses to exercise those powers in disregard of the aim for which it has them.*

To purport to draw a distinction, as the Commission does, between an infringement of the law consisting in the unintentional application of a rule of law that differs from that which the legislature intended and a misuse of powers, which arises only where a rule of law is deliberately used for a purpose that differs from that intended is, in my view, at any rate in this case, devoid of substance.

In the first place, I fully share the opinion expressed by Mr Advocate General Lagrange to the effect that 'a misconception by a public authority concerning the extent of its powers necessarily constitutes an infringement of a rule of law, on the assumption that the rule has previously been defined'.[24]

Furthermore, the two charges may merge completely particularly where a public authority has no discretion but is legally bound to exercise its discretion in a certain way and not in another.[25]

Secondly, there is no doubt that the Commission refused of its own volition to exercise the powers conferred upon it under Article 15B by ascribing to them a purpose which, according to the applicants, differs from their true purpose.

I would point out that in its judgment of 29 November 1956,[26] the Court stated that 'even if the defendant has committed certain errors in selecting the basis for its calculations, . . . it is not to be held that its errors constitute *ipso facto* proof of misuse of powers unless it has also been established objectively that the High Authority pursued in this case, through a serious lack of care or attention amounting to a disregard for the lawful aim, purposes other than those

23 — See, for instance, the judgment of 21 June 1984 in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, paragraph 30 of the decision.

24 — On this point see the Opinion of Mr Advocate General Lagrange in Case 3/54 *Assider* v *High Authority* [1954-56] ECR 72 at p. 85.

25 — On this point see the Opinion of Mr Advocate General Lagrange in Case 8/55 *Fédération charbonnière de Belgique* v *High Authority* [1954-56] ECR 260 at p. 272.

26 — *Fédération charbonière de Belgique* v *High Authority* [1954-56] ECR 292 at p. 303.

for which the powers provided for . . . were conferred'.

In my view, therefore, the applicants' allegation is indeed one of a misuse of powers. For such a submission to be admissible, it is sufficient if it is expressly advanced and the reasons for which, in the applicants' view, there has been a misuse of powers in relation to them are stated. Proof of the existence of a misuse of powers is a matter for consideration in connection with the substance of the case. [27]

In order to ascertain whether this submission is well founded, it is necessary to compare the purpose actually pursued by the authorities with the lawful purpose, that is to say the purpose which they should have pursued or, in the circumstances, to consider whether the Commission, by taking only those measures which it adopted and refusing to adopt the measures specifically referred to in Article 15B (5) of Decision No 234/84/ECSC, objectively misconceived the purpose for which those measures were laid down.

What is the position in this case?

Article 15B had been adopted at the height of the crisis in the steel industry (see the third recital in the preamble to Decision No 3746/86/ECSC [28] repealing that article).

Its purpose, in accordance with the concern expressed by the Council, was to ensure that 'the restructuring of the steel industry is . . . .. carried out within a competitive context compatible with the solidarity imposed by the production quota system'. That meant being able to react with the utmost speed in order to stop any significant alteration in traditional deliveries due to an illegal practice, without waiting until the penalties normally imposed in respect of such a practice had been able to take effect and re-establish traditional patterns of trade.

In Case 45/84 R, the Commission itself argued that it had been necessary to adopt Article 15B because experience had shown that the existing sanctions did not always make it possible to obtain the intended result within the required period (*European Independent Steelworks Association* v *Commission* [1984] ECR 1749 at p. 1762).

It follows from the foregoing that, in assessing the cases raised with it, the Commission should not have lost sight of the fact that Article 15B had in fact provided it with the specific — and in principle the most appropriate — means for penalizing the practices to which they applied.

Unless it was absolutely certain of being able swiftly to achieve the aim of Article 15B by means of 'classic' penalties, the Commission should, at any rate in parallel with the imposition of those penalties, have reduced the delivery quotas as provided for in paragraph 5.

In view of the urgent need to bring to an end the adverse consequences for the Italian undertakings of the unlawful conduct in question, the imposition of two separate penalties was quite legitimate.

Admittedly, a reduction in the quotas that might be delivered in the common market would not have ensured that the undertakings at fault would actually reduce their exports to Italy. This shows, by the way,

27 — On this point see the judgment of 11 February 1955 in Case 3/54 [1954-56] ECR 63 and the judgment of 16 July in Case 8/55 [1954-56] ECR 245.

28 — Commission Decision No 3746/86/ECSC of 5 December 1986 amending Decision No 3485/85/ECSC on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1986, L 348, p. 1).

that Article 15B (5) does not interfere with the free movement of goods to any greater extent than the provision establishing the actual principle of having delivery quotas for the common market.

Such a reduction in quotas would, however, have constituted a fairly powerful inducement for the undertakings in question to re-establish traditional patterns of trade.

In this case, the Commission carried out its investigation and imposed 'classic penalties' in a manner that was too slow to be compatible with the nature of Article 15B which requires urgent action.

In its answers of 30 October 1986 to the questions put to it by the Court, the Commission expressly acknowledged that 'so far, consideration of the figures for the first quarter following the imposition of the penalties (fourth quarter of 1985) has not revealed any rectification of the situation; an investigation is in progress'.

Thus, events have also shown that the 'classic penalties' did not permit the purpose of Article 15B, namely the re-establishment of traditional patterns of trade, to be achieved. The Commission's failure to exercise the powers conferred upon it by that provision therefore constituted a failure to have regard to the purpose for which those powers had been vested in it and therefore a misuse of powers.

For all those reasons, I suggest that the Court declare admissible the actions brought by Assider and the Italian Government against the Commission for failure to act, and declare void the Commission's implied decisions refusing the applicants' formal requests. Under Article 69 (2) of the Rules of Procedure, the Commission should be ordered to pay the costs.