OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 1 December 1987 *

Mr President,
Members of the Court,

1. The first of the five actions which I have to deal with today was brought against the Commission by the undertaking Stahlwerke Peine-Salzgitter (Case 33/86). The action is for a declaration that Article 5 of Decision No 3485/84/ECSC extending the system of quotas [1] is void in so far as it does not make provision for the proportion of production quotas which may be delivered within the common market (also called the 'delivery quota') to be adjusted equitably in the case of undertakings whose delivery quotas are significantly below the Community average. The undertaking Hoogovens Groep BV has intervened in support of the conclusions of Peine-Salzgitter.

2. The actions brought by Peine-Salzgitter in Cases 44/86 and 110/86 are for declarations that the individual decisions of the Commission fixing the delivery quotas of that undertaking for the first and second quarters of 1986 are void. Finally, Cases 226/86 and 285/86 concern two actions brought by Hoogovens Groep BV against the quotas allocated to that undertaking for the third and fourth quarters of 1986. As a procedural issue, the applicants claim that Decision No 3485/85/ECSC is unlawful.

I — Admissibility of the application in Case 33/86

3. The Commission's main submission is that the action for annulment brought by Peine-Salzgitter against the general decision is inadmissible. It contends that because of the lack of the Council's assent it had no discretion in the matter and that therefore there can be no question of a misuse of powers on its part.

4. In order for that submission to be admissible, it is sufficient for an express allegation to be made and arguments adduced to substantiate the misuse of powers in regard to the applicant. Proof that it was actually committed falls within the examination of the substance of the case. [2] Those conditions are fulfilled in this case.

II — Substance

5. On 25 September 1985 the Commission addressed a communication to the Council on the 'Introduction of a system of production quotas under Article 58 of the ECSC Treaty after 31 December 1985' (Doc. COM(85) 509 final).

6. In that communication the Commission stated that:

* Translated from the French.

1 — Commission Decision No 3485/85/ECSC of 27 November 1985 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (Official Journal 1985, L 340, p. 5).

2 — See in particular the judgment of 21 February 1984 in Joined Cases 140, 146, 221 and 226/82 *Walzstahl Vereinigung and Thyssen Aktiengesellschaft* v *Commission* [1984] ECR 951, paragraph 18 at p. 982.

'VII. . . .

(2) Since there has been a far-reaching change in the pattern of steel trade between the Community and the rest of the market since the introduction of the quota system, a review would also have to be made of the situation of steel-makers whose ratio between the part of production quotas which may be delivered in the Community and production quotas is, for all products covered by the system, much lower than the Community average. These historical situations are no longer in line with Community steel policy objectives and the Commission intends, in respect of each firm's production, to bring down this ratio to no more than 10% below the Community average, where this has not been the case so far.

VIII. . . . in addition to these necessary adjustments . . . '.

7. In response to a question put to it by the Court, the Council stated that it had not given its assent regarding that aspect of the Commission's communication. The Council did not state the reasons for that refusal.

8. The Commission subsequently adopted Decision No 3485/85/ECSC which does not contain such a provision.

9. Two major questions arise with regard to these actions:

Did the Commission have the power to adopt the proposed provision without having to obtain the Council's assent?

Alternatively:

If the Council's assent was necessary, may and must the contested measures still be annulled?

A — *Did the Commission have the power to adopt the provisions in question without having to obtain the Council's assent?*

10. The question of the extent of the Commission's powers where the Treaty requires the Council's assent has already been debated before the Court.

11. With regard to the amendment, by the High Authority only, of a decision made with the assent of the Council, the Court, in its judgment of 13 July 1965 in Case 111/63 (*Lemmerz-Werke GmbH* v *High Authority* [1965] ECR 677, at p. 699) and its judgment of 13 July 1965 in Case 37/64 (*Mannesmann AG* v *High Authority* [1965] ECR 725, at p. 741), made a distinction between 'the very basis' or 'essential structure' of the financial arrangements provided for in Article 53 (b) of the ECSC Treaty and the other elements of those arrangements. It held that 'there is no justification for the conclusion that the decisions of the High Authority taken with the unanimous assent of the Council could only be amended, even in the case of amendments not affecting the basis of such decisions, by a new decision also taken with the unanimous assent of the Council'.

12. As regards the respective roles of the High Authority and the Council in the application of the first two paragraphs of Article 58, Mr Advocate General VerLoren van Themaat examined in detail the

different ways in which those provisions may be interpreted and the opinions of academic writers on this matter (Opinion of 26 May 1982 in Case 119/81 [1982] ECR 2658, at pp. 2672 to 2677).

13. He reached the conclusion that for the adjustment of the quota system the Commission had a certain degree of independence and that the Council did not have to approve all the details of the system. It was sufficient for the Council to give its assent to 'the basic structure and essential features' of the rules. I share that view entirely.

14. The Court itself gave its own views on this question in its judgment of 11 May 1983 in Case 244/81 (*Klöckner-Werke AG* v *Commission* [1983] ECR 1451, at p. 1477). After pointing out that when certain conditions are fulfilled the Commission is under a duty to establish a system of production quotas, the Court stated as follows:

'The power to take the appropriate measures lies, under Article 58, with the Commission, subject to the condition that it may not act except with the "assent" of the Council.

In laying down that form of consultation between the Commission and the Council, Article 58 did not determine its detailed arrangements. In those circumstances, it is a matter for the two institutions to provide, by common consent and in accordance with their respective powers, for the form which their cooperation shall take. The requirements of Article 58 are thus satisfied if such cooperation culminates in the Council's assenting to the "quota system" which the Commission proposes to set up, without it being necessary to require the two institutions to examine a detailed draft decision' (paragraphs 10 and 11 of the judgment).

15. I think that it may reasonably be concluded from the judgments cited that the Court, too, takes the view that the Council must give its assent only to the essential structure of the system and that it is for the Commission, acting pursuant to its own powers, to regulate all the other aspects. It is not simply a matter of drafting in the form of articles rules which the Council has settled down to the last detail.

16. Article 58 (2) provides in fact that:

'The High Authority shall, on the basis of studies made jointly with undertakings and associations of undertakings, determine the quotas on an equitable basis, taking account of the principles set out in Articles 2, 3 and 4'.

17. The quota system must not be such that it prevents the High Authority from fulfilling that responsibility. It must give the High Authority sufficient discretion to enable it to take account of cases of hardship, that is to say excessively severe consequences which the straightforward application of the general system might have in individual cases and for which it may adopt appropriate measures in the event of unforeseen developments. The Commission must be at liberty to insert provisions to that effect in the general decision.

18. I do not in fact believe that it would be for the Commission to settle those questions case by case directly on the basis of Article 58 (2). On the contrary, the most appropriate course would be for the Commission to determine for itself relevant rules of conduct and criteria and incorporate them

in the decision establishing or extending the quota system.

19. In my view, those decisions therefore contain two kinds of provisions: those forming the essential structure of the system, adopted with the assent of the Council, and those which were adopted, or could have been adopted, by the Commission exercising its own powers. Into the latter category fall in particular provisions providing for fairness and flexibility, such as Article 14 *et seq.* of the decision now in question.

20. One of the provisions adopted by the Commission pursuant to its own powers is Article 18 (1). Article 18 (1) is worded as follows:

'If radical changes occur on the iron and steel market or if the application of this decision encounters any unforeseen difficulties, the Commission shall carry out the necessary adjustments by general decision'.

That provision has been in existence since the second decision on quotas, that is to say Decision No 1831/81 of 24 June 1981 (Official Journal 1981, L 180, p. 1). The first decision (No 2794/80 of 31 October 1980, Official Journal 1980, L 291, p. 1) also contained an article providing that the Commission could adjust the provisions of the decision, but only at the request of an undertaking and only in the event of exceptional difficulties (Article 14).

21. Prima facie, Article 18 (1) is an enabling provision. But it should not be forgotten that under the ECSC Treaty the power to adopt decisions of general scope belongs to the Commission and not to the Council and that it is the Commission which is responsible with regard to undertakings for the determination of quotas.

22. Therefore in reality Article 18 (1) only confirms or refers back to the power which the Commission has under the Treaty to adopt all the measures necessary for ensuring that the quotas are equitable.

23. So far, 17 decisions have been adopted by the Commission on the basis of that provision. None of those decisions has been challenged by the Council or by an individual Member State. The wide scope of some of those decisions is clear, for example, from a reading of the preamble to Decision No 2804/81 (Official Journal 1978, L 278, p. 1) by which the Commission introduced *inter alia* a different abatement rate for concrete reinforcing bars and merchant steel and separate quotas for Categories V and VI and created new possibilities for derogating from the general rules.

24. The only Commission decisions based on Article 18 which have been declared void by the Court were annuled pursuant to actions brought by undertakings (see the judgment of 21 February 1984 in Joined Cases 140, 146, 211 and 226/82 *Walzstahl-Vereinigung and Thyssen Aktiengesellschaft* v *Commission* [1984] ECR 951, to which I shall refer later). Therefore neither the Council nor any individual Member State has ever questioned before this Court the power of the Commission to act on its own if radical changes occur on the iron and steel market or if the application of the quota system encounters any unforeseen difficulties nor have they challenged the way in which the Commission has interpreted the extent of its powers in those 17 decisions.

25. Of course, there is nothing to prevent the Commission from submitting to the Council for its assent provisions which fall within its own powers. It is quite understandable that in a situation in which the need for more flexibility is becoming apparent at about the same time when the quota system is about to expire, the Commission should wish to take the opportunity presented by the decision to extend the quota system in order to introduce new provisions with the Council's agreement.

26. However, it would be a misuse of power if the Commission was mistaken about the type of provisions requiring the Council's assent and, in the absence of its agreement, refrained from adopting measures which it considered necessary in themselves in order to enable it properly to carry out its task of determining quotas on an equitable basis.

27. The question to be examined now therefore is whether that was the situation in this case.

28. In the relevant passage in the communication which it addressed to the Council on 25 September 1985 the Commission explained in a particularly firm manner why it was 'necessary' to review the situation of undertakings whose ratio between the part of production quotas which may be delivered in the Community and production quotas (I:P ratio) is, for all products covered by the system, much lower than the Community average. It considered that there had been a far-reaching change in the pattern of steel trade between the Community and the rest of the market since the introduction of the quota system and that those historical situations were no longer 'in line with Community steel policy objectives'.

29. It may be deduced from that statement that the Commission itself took the view that the delivery quotas of the undertakings in question could no longer be regarded as equitable.

30. Even those not willing to accept the argument that Article 18 (1) merely refers to a power which the Commission has in any case would have to accept, I think, that since the Commission firmly believed that radical changes on the iron and steel market, within the meaning of that article, had occurred, it therefore had to proceed, on the basis of that provision and by general decision, to make the adjustments necessitated by the new situation.

31. The measure considered necessary by the Commission was a measure 'to bring down this ratio to no more than 10% below the Community average, where this has not been the case so far'. I consider that such a measure would not have called in question one of the basic or essential features of the quota system. In my view, such essential features are constituted by the very principle of having quotas for delivery on the internal market, separate from production quotas, and calculating them in relation to a given reference period.

32. The Commission's intention to introduce, for undertakings in the situation described above, a partial derogation from the latter rule would, in my view, merely have been an exception confirming the rule.

33. It is clear from a table set out in the defence that six undertakings have an I:P

ratio lower than the Community average for one category of products and that three undertakings have an I:P ratio lower than the Community average for two product categories. In the case of Peine-Salzgitter, four product categories are involved. However, if one starts from the principle — which seems to have been the Commission's intention — that an improvement in the I:P ratio of any given undertaking would not be accorded unless it was lower than the Community average *for all the products* covered by the system (also taken as an average, no doubt), then those 10 undertakings would not all have benefited from the measure.

34. Nor may the undertakings in question be regarded as constituting a 'group of undertakings characterized by their structure' as was the case in Joined Cases 140, 146, 211 and 226/82 *Walzstahl-Vereinigung and Thyssen* v *Commission*, cited above, since they do not have the same degree of specialization.

35. There would be even less justification for accusing the Commission of wanting to circumvent the procedure laid down in Article 14 of the decision because that provision provides no satisfactory remedy for the problem now in question.

36. It may therefore be rightly concluded that the measure envisaged by the Commission did not constitute an amendment of a basic or essential feature of the quota system. The Commission's own powers allowed it to introduce an article to that effect, either in Decision No 234/84, which was in force until 31 December 1985, by invoking Article 18 of that decision, or directly in the new Decision No 3485/85, applicable as from 1 January 1986, or after that date by invoking Article 18 of that new decision (which was re-enacted without amendment).

37. In deciding that it needed the Council's assent to adopt the measure in question the Commission was mistaken about the extent of its powers and in not making provision in Decision No 3485/85/ECSC for the adjustment of I:P ratios in cases in which it recognizes itself that they are inequitable, the Commission committed a misuse of power with regard to the undertaking Peine-Salzgitter (which, as is clear from the defence, was in the situation envisaged).

38. It remains to ascertain whether it is necessary to declare void Article 5 of the decision, as the applicant requests, or any other article, or the entire decision.

39. Article 5 provides essentially that: 'The Commission shall fix each quarter, for each undertaking, the production quotas and the part of such quotas which may be delivered in the common market:

(i) on the basis of the reference production and quantities referred to in Articles 4 (5) and 6,

(ii) by applying the abatement rates referred to in Article 8 to such reference production and quantities'.

40. The annulment of that provision would therefore have practically the same effect as the annulment of the entire decision. The annulment of Article 6, which defines the reference periods, would also remove the basis of all the individual decisions fixing quotas. As the Commission points out, the provision sought by Peine-Salzgitter should have been the subject of a separate article. It must also be noted that the ECSC Treaty does not contain a provision like Article 174

of the EEC Treaty which allows the Court to state which of the effects of the regulation declared void are to be considered as definitive.

41. I would therefore propose that the Court should use the following wording which is based on the conclusions of the applicant and which, in my view, would allow the validity of the general decision and of most of the individual decisions based on it to be maintained:

'Commission Decision No 3485/85/ECSC is declared void in so far as it does not allow equitable delivery quotas to be determined for undertakings whose I:P ratios are, for all products covered by the system, significantly below the Community average'.

42. For reasons of clarity and because formal conclusions to this effect have been submitted to the Court, it would, however, be necessary to add that the individual decisions which are the subject of Cases 44, 110, 226 and 285/86 are also declared void.

B — *If the Council's assent was necessary in this case, what are the consequences for the applications now before the Court?*

43. I will examine this second question as an alternative possibility.

44. In paragraph 6 of its judgment of 7 July 1982 in Case 119/81 (*Klöckner-Werke AG* v *Commission* [1982] ECR 2627) the Court stated in paragraph 6 that 'the obtaining of the assent of the Council is one of the essential procedural requirements laid down by the Treaty.'

45. The Commission cannot therefore adopt a measure to which the Council has refused to give its assent. If the provision in question in these cases did require the Council's assent and the Commission had ignored the absence of such assent and adopted the measure, the Court would have been obliged to declare it void if asked to do so.

46. However, neither an undertaking nor the Commission nor a Member State can bring an action against the Council for failure to act for not giving its assent because the ECSC Treaty does not allow actions for failure to act to be brought against the High Authority.

47. Finally, the Council's decision refusing assent may not be the subject of an action for annulment either. The only matters which may be pleaded in support of such applications — which may not, in any case, be brought by undertakings but only by Member States or by the Commission — are lack of competence or the infringement of an essential procedural requirement (Article 38). A refusal to give assent will, however, always constitute an exercise of the Council's discretion to assess a complex economic situation.

48. The Commission does not therefore have the means to require the Council to give its assent. Therefore, an action for failure to act brought by an undertaking against the Commission for not having included the provision in question in its general decision would have no purpose.

49. Is this to say that, owing to all those special characteristics of the ECSC Treaty, the Council's refusal to give its assent to a

particular provision which an undertaking wishes to see included in the quota system can never be challenged, even indirectly?

50. I do not think so. It must be remembered that, according to Article 31 of the ECSC Treaty, 'the Court shall ensure that in the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed'. That provision as well as the principle of legal protection require that the Court should be able to ensure that the rule laid down in Article 58 (2) requiring quotas to be determined on an equitable basis is observed.

51. By examining either the general decision or an individual decision determining quotas the Court could establish that the system as constituted at present does not allow that result to be achieved. It would not need to allow itself to be influenced by the question whether or not that situation arose from the lack of Council assent to a particular provision envisaged by the Commission.

52. If the Court considered it necessary to declare the general decision void or unlawful, it would then be for the Commission to send to the Council for its assent a communication setting out the provisions which would enable it to determine the quotas on an equitable basis. If the communication contained a provision identical to that in respect of which the Council first refused its assent, the Council would have to consider carefully whether a second refusal would be the most judicious attitude to take.

53. The Commission could also submit to the Council a proposal allowing equitable quotas to be determined in ways other than those originally envisaged.

54. It follows from the argument set out above that the annulment of the general decision and of individual decisions would not be excluded in the present case, even if the Court should come to the conclusion that the Council's assent was necessary.

55. Would such an annulment be justified in substance? In this regard I stated earlier that it may be deduced from the Commission's communication of 25 September 1985 that this institution took the view that the adjustment in question was necessary in order for quotas to be fixed on an equitable basis. The applicants share that view. The Court has asked the Council to state the reasons for which it refused its assent, but the Council has not replied to that question.

56. It therefore seems to me that in the present case the Court need not 'examine the evaluation of the situation, resulting from economic facts or circumstances' made by the Commission (second sentence of Article 33 of the Treaty) since that evaluation is not contested by the applicants.

57. It is therefore sufficient for the Court to state that, in the view of the authority responsible for determining quotas and in the view of the applicant companies, the decision in question does not enable that authority to carry out its task properly.

58. In other words, even if assent was necessary, the general decision and the individual decisions which are the subject of the actions brought by Peine-Salzgitter and Hoogovens must be declared void.

III — Conclusion

59. For the reasons explained in part A of this Opinion I propose that the Court should:

Declare void Commission Decision No 3485/85/ECSC of 27 November 1985 in so far as it does not allow equitable delivery quotas to be determined for undertakings whose I:P ratios are, for all products covered by the system, significantly below the Community average;

Declare void the individual decisions determining quotas that are the subject of Cases 44, 110, 226 and 285/86;

Order the defendant to pay the costs, including those of the intervener in Case 33/86.